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ORIGINAL

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-6766

JOE HAYES, PETITIONER

V.

STATE OF FLORIDA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT

APPENDIX

(1)

13712

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR CHARLOTTE COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA,

Plaintiff,

vs. Case No. 80-156-CF-A-RMS

JOSEPH HAYES,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Before the Honorable Judge James Adams, Judge of said Court, at the trial of the above-styled action held in the LaBelle County Courthouse, LaBelle, Florida, commencing at 9:30 A.M., Wednesday, July 8, 1981.

APPEARANCES:

EUGENE C. BERRY, Assistant State Attorney, Charlotte County Courthouse, Punta Gorda, Florida 33950; representing the Plaintiff.

ROBERT M. BADER, Attorney at Law, Post Office Box 267, Punta Gorda, Florida 33950; representing the Defendant.

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(Voir Dire was had on Tuesday, July 7th, 1981, and was not transcribed.)

(Whereupon, the second day of trial resumed at 9:30 A.M., and opening statements were had and were not transcribed.)

MR. BERRY: Your Honor, the State will call Julianne Hollander.

Whereupon,

JULIANNE HOLLANDER,

a witness, produced for and in behalf of the State of Florida, having been first duly sworn by the Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BERRY:

Q Would you state your full name, please, ma'am?

A Julianne Hollander.

Q Mrs. Hollander, I can't hear you, and I'm sure they can't.

Would you state your full name, please?

A Julianne Hollander.

Q Mrs. Hollander, where do you live, ma'am?

A I live at 401 West Retta Esplanade, Punta Gorda, Florida.

Q And is that located in Charlotte County, Florida?

A Yes, it is.

Q How long haveyou lived at that address?
A Ten and a half years.
Q And were you living at that address back on May 12th and May 13th of 1980?
A Yes.
Q Mrs. Hollander, how old are you?
A I'm 51.
Q What's your date of birth?
A September 30th, 1929.
Q Mrs. Hollander, would you describe your house to me, please?
A My house is an old house in the center of town with a large porch on two sides, two-story house, there are two bedrooms downstairs, living room, kitchen, bathroom, and three bedrooms upstairs.
Q And is that your dwelling, is that where -- is that your place of abode?
A Yes.
Q You live there?
A Yes.
Q Sleep there?
A Yes.
Q Cook there, eat there?
A Um-hmm (affirmative).
Q It's your home?

A Yes.

Q And was it your home back on May 12th and May 13th of 1980?

A Yes.

Q Back on May 12th and May 13th of 1980, who, if anyone, was living there with you?

A My two daughters.

Q And what are their names, please?

A Gail and Laura.

Q And how old are they?

A Now, or then?

Q Then, now.

A Now Gail is -- Gail is now 27; Laura is now 19.

Q So they would have been 18 and 26 a year ago?

A Right.

Q They were living there with you at the time?

A Yes.

Q I now direct your attention to the evening of May 12th, 1980.

Did you retire that evening to bed?

A Yes.

Q First of all, Mrs. Hollander, let me ask you this; are you employed?

A Yes, I am.

Q Where do you work at?

A I work for the First National Bank in Punta Gorda.
Q And in what capacity?
A At that time I was a teller. Now I'm a new accounts clerk.
Q How long have you worked at the bank, all together?
A All right -- umm, fifteen months.
Q You were employed at the bank at that time in May of 1980?
A Yes. I had not been there quite two months.
Q Okay. All right, now getting back on track, I direct your attention back to the evening of May 12th, 1980.
Did you retire and go to bed that evening?
A Yes, I did.
Q About what time did you go to bed?
A About 11:30.
Q Was there anyone home at the time you went to bed?
A My older daughter, Gail.
Q And, now, where is your bedroom, you have previously testified there's two bedrooms downstairs and one or two upstairs?
A Three.
Q Three upstairs. All right.
Where is your bedroom in relation to the house?
A My bedroom is downstairs, right off the living

room.

Q How about Gail, where --

A My older daughter, Gail, sleeps upstairs.

Q And you went to bed about 11:30 in the evening?

A Yes.

Q Where was Gail when you went to bed?

A We both went to bed at the same time.

Q Now, you mentioned you had another daughter, Laura?

A Yes.

Q Was she home at the time you went to bed?

A No, she wasn't. She was out.

Q She was out for the evening?

A Yes.

Q Now, describe your front door to me, if you would, please.

A My front -- my front door is an old door with a large window in it, and at the time it had -- it's old and the lock is old, and all we had to lock it with was a skeleton key.

Q Did you have a screen door there, too?

A There is a screen door.

Q And at that time did you normally lock that front door with one of your daughters still out?

A We weren't locking the door. Mainly we left it open for ventilation.

Q Okay. This was in May of 1980, was it a little hot then?

A It was hot and we were not air conditioned.

Q You don't have air conditioning in the house?

A We have air conditioning, we're not using it.

Q So at that time you were using -- you'd leave the front door open, just close the screen door; am I correct, there, for ventilation?

A Um-hmm (affirmative).

Q And is that the door -- is there a porch outside there?

A Yes.

Q Now, you testified that you went to bed about 11:30 at night and that your older daughter Gail went to bed upstairs; is that correct?

A Yes. We said goodnight to each other at the bottom of the steps.

Q And Laura was out for the evening?

A Yes.

Q Did you have the occasion to be awakened at approximately 2:30 A.M. on May 13th?

A Yes.

Q Okay. Would you tell us what awoke you and your thoughts?

A Well, I was -- I was sound asleep, and --

Q Excuse me, could you speak a little bit louder, please?

A I was sound asleep and something began to disturb my sleep. Of course, at first, I didn't know what it was, but as I came to consciousness, I realized that something was touching my side. I was lying on my right side, and I had a sensation of something touching my left side.

Q All right. Now, if you would stop for just one moment there, you said you were lying on your right side?

A Yes.

Q Is there a door that comes into your bedroom?

A Yes.

Q From the hallway?

A Yes.

Q Would your back have been towards the door or would your stomach have been towards the door?

A My back was towards the door.

Q All right. You say you're lying on your right side and something was touching you. Please continue.

A As I became more fully conscious, in my mind I thought it was my daughter, that she had arrived home and had something she wanted to tell me. So I raised up on my right arm and turned to look and saw somebody, and realized instantly that it wasn't my daughter.

Q Did that somebody say anything?

A Yes.

Q What?

A It was a man, and he said, "I want to feel your cunt."

Q Did he threaten you in any way?

A Before I could react at all, he grabbed my free right arm and clamped his other hand over my mouth.

Q Did he say anything else?

A Yes. Then he pushed me on the bed with himself on top of me, behind me, with his hand clamped over my mouth, he said, "One scream out of you, lady, and you're dead."

Q Now, you were -- at that point were you lying on your stomach?

A Yes.

Q And he was on top of you, behind you?

A Yes.

Q What occurred next, if anything?

A He -- umm -- he -- umm-- ran his hand over my body and he penetrated my vagina with his penis.

Q How were you dressed at the time before he got there?

A I had on a nightgown.

Q Did you have on anything underneath it?

A No.

Q Now, you say he penetrated your vagina, what did he penetrate it with?

A His penis.

Q Could you feel it going in your vagina?

A Yes.

Q Was there a -- could you feel any ejaculation?

A No. He shortly after that he withdrew and then he again felt around and felt the rectal area and I knew -- I knew what he had in mind, and it was the only time that I spoke, I said, "Please don't do that."

Q Did he answer you?

A No. I -- I could tell that that was the wrong thing to have said. Then he began to attack me anally.

Q How did he attack you anally?

A He penetrated the rectal area with his penis.

Q Did he do that with your permission?

A No.

Q Did he penetrate your vaginal area with your permission?

A No.

Q Were you frightened at the time?

A I was terrified.

Q What happened next?

A It seemed like an eternity, he continued to attack

me for quite awhile, and then he withdrew and he prepared to leave.

Q Excuse me, let me stop you right there.

Mrs. Hollander, you have children?

A Yes.

Q I'm sure that you know about in regards to sexual intercourse, ejaculation, what that means?

A Yes.

Q At any time did you ever feel the sensation or any feeling or any substance on you of ejaculation?

A No.

Q Now --

A He had been drinking.

Q Could you smell the odor of alcohol about him?

A Yes.

Q Now, I think you said that he then started to leave, please explain that.

A As he started to leave, he said, "Wait a few minutes before you call the police," or something to that effect. And he got up to leave and he forgot, evidently, that there are steps inside of my bedroom, and he stumbled. I heard him stumble, and he fell against the door. I heard the door slam with him inside the bedroom.

Q Okay. Now, the door slammed with him inside the bedroom?

A Yes.

Q Is that correct, closed, is that what you're saying?

A Yes. Yes.

Q All right. What happened next?

A Well, I turned towards the doorway --

Q Did you look at him?

A Yes. As he stood there, he stood there for a few seconds dazed, and then he opened the door and left.

Q Okay. Do you know how he left your house?

A He went out the front door. I heard the screen door slam.

Q What did you do then?

A I went to my bedroom window and peered out through the blinds.

Q Does that window have a view out to the front of your house?

A Yes. Well, to the side street.

Q Did you see him after he got outside?

A Yes, I saw him as he hit the bottom step as he walked across the yard to the sidewalk and ran down the sidewalk.

Q In what direction did he go from your house?

A He went south.

Q South.

Would you describe this individual for me?

A He was tall, slender, short hair; he -- my description of his voice was that he didn't have an accent to me, he didn't have a southern accent, or --

Q About how tall would you say he was?

A Between 5'10" and 6 foot.

Q When you say "slender", what do you mean by that?

A Well, about 160 pounds, about 160 pounds.

Q You said "short hair", do you mean normal hair, or how would you describe that?

A Well, about like yours.

Q Is that man here in the courtroom today?

A I believe he is.

Q Would you point him out, please?

A He's sitting next to Mr. Bader. (Indicating.)

Q Are you pointing to the gentleman right here? (Indicating.)

A No, sir.

Q Are you pointing to this gentleman right here? (Indicating.)

A Yes, sir.

MR. BERRY: We'd ask the record to reflect that she has identified the defendant, Your Honor.

THE COURT: Let the record so reflect.

///

BY MR. BERRY: (continuing)

Q Prior to that night, did you know him?

A No.

Q Had you ever given him permission to enter your home?

A No.

Q To your knowledge, the entire time that you've been living in that house, I think you said you'd lived there approximately ten years?

A Yes.

Q Which would have been about nine years before that, to your knowledge, had that man ever been in your house prior to that night?

A No, sir.

Q Now, after he left, what did you do next?

A My first reaction was to awaken my daughters. We had been negligent about locking our doors, and I wanted to shock them enough that we would change our habit so that something like this would not happen again or happen to them. I went into my younger daughter's bedroom and I awakened her.

Q That would be Laura?

A Laura. She -- her bedroom is on the first floor. I awakened her and I told her -- asked her to come with me. We went upstairs to my older daughter's room, Gail, and we

awakened her. They knew that there was something wrong, they were afraid there'd been a death, and I told them what had happened. It was they who -- well, I knew that I should call the police, but it was they who insisted.

Q Did youwant to call the police, you, in the beginning?

A I was not going to call the police.

Q Were you ashamed?

A I was just thankful that it was over. That I had survived. That it had not been my daughters. As long as I had survived, I just -- I guess I just wanted to be done with it.

Q Did you call the police?

A Yes.

Q Did they come?

A Yes.

Q Did the officers take you to the hospital, one of the officers?

A Yes.

Q Were you examined?

A Yes.

Q Was there any -- did you have any physical -- anything wrong with you physically?

A No.

Q Were you in any pain?

A Not at that time, no.

Q Did some develop later?

A I was uncomfortable and afterwards for about a week I had some discomfort. I wasn't able to sit down very well. There was a little bleeding.

Q From where?

A The rectal area.

Q Is that where your discomfort, pain was coming from?

A Yes.

MR. BERRY: May I have just one moment, Your Honor?

THE COURT: Sure.

MR. BERRY: Your Honor, at this time we'd ask that this be marked State's Exhibit Number 1 A, B, C, D, E, F, G, H, I and J for identification purposes only.

THE COURT: Very well. So be it.

MR. BADER: (Indicating.)

(Whereupon, the following bench conference was conducted out of the hearing of the jury as follows.)

MR. BADER: If these are going to be used in the testimony, I will object to them as --

THE COURT: They're being marked for I.D. Go ahead and see what he's going to do next.

MR. BADER: But I'm afraid he's going to use them, and you might not know, but I know he is, and I want to make sure.

THE COURT: I'm the one making the ruling. They will be marked for I.D.

MR. BADER: I have no objection to that, but I want to be sure I can get my motion in before --

THE COURT: You will get your motion in.

MR. BADER: Okay.

(Whereupon, the bench conference was concluded and the following further proceedings were conducted within the hearing and presence of the jury.)

(Whereupon, State Exhibit Number 1 A, B, C, D, E, F, G, H, I, and J were marked for identification purposes only.)

BY MR. BERRY: (continuing)

Q Mrs. Hollander, I show you what's been marked as State's Exhibit Number 1-A for identification purposes --

MR. BADER: Your Honor, please, I'm going to object to the use of the exhibits marked for identification.

THE COURT: Objection overruled at this point.

Go ahead, Mr. Berry.

MR. BERRY: Thank you, Your Honor.

BY MR. BERRY: (continuing)

Q I show you what's been marked State's Exhibit

Number 1-A for identification purposes only.

Do you recognize that photograph?

A (Examining.) Yes, sir.

Q What does that represent?

A That's the front door of my house.

Q I show you what's been marked State's Exhibit Number 1-B for identification purposes only.

Do you recognize that photograph?

A (Examining.) Yes, sir, that's the picture of the inside of the front door of my house.

Q I show you what's been marked State's Exhibit Number 1-C for identification purposes only.

Do you recognize that photograph?

A (Examining.) Yes, sir, that's the door between the living room and the hallway. Also would be where the upstairs stairway.

Q I show you what's been marked State's Exhibit Number 1-D for identification purposes only.

Do you recognize that photograph?

A (Examining.) That's a picture of the doorway looking into my bedroom.

Q I show you what's been marked State's Exhibit Number 1-E for identification purposes only.

Do you recognize that photograph?

A (Examining.) Yes, that's a picture of my

bedroom taken from the doorway, outside of the bedroom.

Q I show you what's been marked State's Exhibit Number 1-F for identification purposes only.

Do you recognize that photograph?

A (Examining.) Yes. It's a picture of the steps inside my bedroom.

Q I show you what's been previously marked State's Exhibit Number 1-G for identification purposes only.

Do you recognize that photograph?

A (Examining.) That's a picture from inside the bedroom of the door going out of the bedroom.

Q I show you what's been previously marked State's Exhibit Number 1-H for identification purposes only.

Do you recognize that photograph?

A (Examining.) That's a picture of the steps inside the bedroom from the inside view.

Q Okay. I show you what's been previously marked State's Exhibit Number 1-I for identification purposes only.

Do you recognize that photograph?

A (Examining.) Um-hmm (affirmative), it's a picture of the bedroom inside. Beside the bed.

Q Do you recognize the window in the photograph?

A Yes, sir.

Q Is that the window to the outside?

A Yes.

Q I show you what's been previously marked State's Exhibit Number 1-J for identification purposes only.

Do you recognize that photograph?

A (Examining.) Yes, it's a picture of the bed.

MR. BERRY: Cross examine.

THE COURT: Let's take a ten-minute recess before we start this.

While you're gone, do not discuss the case among yourselves nor allow anyone to discuss it with you and arrive at no conclusions at this point.

(Whereupon, a short recess was taken.)

(Whereupon, the jury returned to the courtroom, and the following further proceedings were conducted.)

MR. BERRY: Cross examine.

MR. BADER: You're done? Oh, I didn't realize that.

CROSS EXAMINATION

BY MR. BADER:

Q Mrs. Hollander, you and I are not strangers, are we?

A No.

Q We were not acquainted before this case, however, were we?

A I had met you.

Q Yes, in some social or business affair, association

with your former husband, but we had never socialized?

A No.

Q Or I had never visited your home or anything prior to this case?

A No.

Q And since this case came about, there have been a number of occasions where I have visited and talked with you, haven't there?

A Yes.

Q The first occasion, do you recall that, ma'am?

A You came to my home.

Q Could you recall when that was in relation to this case?

A Well, it was before last October, before the first trial was set -- supposed to be. It was sometime in the summer. I don't remember what month.

Q All right. The alleged offense took place in May, and the case was first coming to trial in October, and you believe I was at your home sometime in --

A In between there.

Q In between. All right. Do you remember what the occasion was and the circumstances of that visit to your home?

MR. BERRY: Your Honor, at this time may we approach the bench?

(Whereupon, the following bench conference was conducted out of the hearing of the jury as follows.)

MR. BERRY: Your Honor, I would simply like to make the statement in defense counsel's presence that this is a civilian witness and I cannot be responsible for anything that she might say in response to his questions in regards to some of the pre-trial things that might be prejudicial against the defendant. The prior trial did not go any further -- I do not see any problem with that, but --

THE COURT: What is this prior trial business?

MR. BADER: Other than -- other than the one that we had --

MR. BERRY: The numerous times the defense counsel has spoke with her, and all I'm saying, Your Honor, is I can't be responsible for what her responses are to Mr. Bader's questions. If it might turn out to be prejudicial to the defendant, I just want to put that on the record.

THE COURT: Okay.

(Whereupon, the bench conference was concluded and the following further proceedings were conducted within the hearing and presence of the jury.)

BY MR. BADER: (continuing)

Q Mrs. Hollander, can you recall the circumstances

that brought me to your home?

A You came, without, you know, prior knowledge on my part that you were coming. You came to see the house.

Q Okay.

A You said.

Q All right. And when I came, you told the jury that I didn't call in advance, and didn't make a prior arrangement with you, do you know whether or not I had tried to call, tried to make arrangements with you?

MR. BERRY: Your Honor, I'm going to object. I think this is irrelevant and immaterial to the case before the Court.

THE COURT: No relevance. Sustained.

BY MR. BADER: (continuing)

Q Ma'am, when I came -- can you recall the hour of the day?

A It was in the afternoon.

Q Do you remember what day of the week it was?

A A Saturday.

Q Were you at home?

A I was at home.

Q And was anybody with me?

A Your wife.

Q And did I introduce to you or introduce myself to you?

A Yes.

Q And did I tell you who I was and why I was there?

A Yes.

Q And did I introduce my wife?

A Yes.

Q And did I explain why I had her present?

A No.

Q And did you invite us into your home?

A I let you come in. I can't say I invited you, exactly.

Q Well, did you --

A I suppose the fact that I let you in means I invited you in.

Q All right. And can you recall what the subject matter of our discussion was?

A The trial.

Q And that was the broad subject, I told you that I was there in my capacity as the lawyer of Joe Hayes?

A You said that it was necessary for you to see the location where the attack occurred.

Q Okay. I told you I was there, I think my question was that I was there for the express purpose of representing Joe Hayes in his defense on the charges in which you were the principal witness, did I not?

A I wouldn't say that you stated it quite that way,

you were much more friendly and much more relaxed, and you didn't come on in a very official way.

Q Okay. But the important thing that I want you to tell the jury is that did you know what my purpose was, that I was there as a lawyer for Joe Hayes?

A Yes.

Q And you did invite my wife and I in, was anybody else at home at the time?

A No.

Q Now, do you recall -- when I asked you if you recall what the subject matter of the discussion was, you said it was about the trial.

Did I ask you specific details and questions concerning what happened on the night of May 12th or May 13th?

A Yes, I believe you did.

Q Did I ask you to tell me again or to tell me for the first time exactly what occurred?

A Yes.

Q As you remembered it that night?

A Yes.

Q And didyou give me those answers?

A Yes.

Q Was not our conversation a purely voluntary and unrehearsed conversation?

A Yes.

Q Did I in any way intimidate or threaten you?

A No.

Q Did I ask to see the bedroom?

A Yes.

Q And didyou show me the bedroom where the events took place?

A Yes.

Q And did you explain to me the sequence of events as you recalled them?

A Yes. I'm sure I did.

Q And do you recall whether or not I asked you if you were able to give a -- give a description of the assailant?

A I'm sure you asked me that. I can't remember every question that you asked, but I'm sure you would have asked that.

Q Can you recall what you were able to tell me about in response to that question?

A I gave you description that I gave Mr. Berry.

Q What description did you give, ma'am?

A It was height, build.

Q Well, what was his height?

A Well, between 5'10" and 6'.

Q Yes, ma'am.

A Slender.

Q Let me ask you where or how you make your judgment that he was between 5'10" and 6 feet; that's a difference of two inches.

A I was judging him by my husband's height. My husband is heavier, so since this man was more slender, I knew he was at least the same height as my husband, 5'10", he looked taller because he was slender. So I knew it was somewhere in between there. I judged him by my husband's height.

Q I, of course, have no idea what your husband's height is, or was, when did you have an opportunity to see him at a fully extended position so that you could measure or evaluate his height?

A When he was standing at the closed bedroom door before he left.

Q That was the time that you saw him -- how long would you think that was that you saw him on that occasion?

A I suppose it was a few seconds. It seemed like -- seemed like a long time.

Q Was the room light like it is here now?

A No.

Q. Was it totally dark?

A There were no lights in the room. There was probably a little light coming from the windows. The walls

are painted white, so you can see a silhouette against the wall pretty well.

Q Okay. That's the same second, isn't it, Mrs. Hollander, the same second that you're telling this jury you saw him long enough to measure his height, the same second you told this jury Mr. Berry's question that he stumbled when he left your bed; isn't it?

A He stumbled and he fell and --

Q And he stumbled and --

MR. BERRY: Your Honor, I'm going to object. He's got to allow the answer before he hits her with another --

THE WITNESS: I said he stumbled and --

THE COURT: Let the witness answer.

MR. BADER: Yes, sir, but I would like to be allowed my freedom to cross examine this witness without being interrupted. I did not interrupt, Counsel.

THE COURT: You will be allowed so much freedom you will be appalled, but you will let the witness answer.

MR. BADER: Thank you, sir.

BY MR. BADER: (continuing)

Q Now, Mrs. Hollander, you told the jury when Mr. Berry asked you that you were over on your belly, he was behind you, when he got up he stumbled and you turned and

looked; is that right?

A When -- as he --

Q Is that correct, is that what you told the jury?

A When he stumbled, he didn't fall to his knees, he stumbled on the steps, he was still in an upright position. He landed against the door and was standing there for a second before he opened the door.

Q And that's when you saw him?

A Yes.

Q That's the second that you saw him?

A It was a few seconds, he was dazed from the fall.

Q Well, do you think it was three seconds, four seconds?

A I don't know. It wasn't a minute.

Q Against that door, which is down the stairs, and it's in a little alcove; isn't it?

A It's not in an alcove, it's right --

Q But it is an alcove, isn't it?

A The head of my bed is right there, it's not an alcove, it's directly to the bed.

Q But the area where the door opens up and the stairs go down is an alcove, isn't it?

A I call an alcove an enclosed area. It's not enclosed.

Q No, it's not enclosed, except on three sides,

isn't it?

A It's not enclosed on three sides, there's two open sides.

Q Mrs. Hollander, there's two open sides?

A The door, and it's open to the room.

Q The door closes it off, the wall closes it off --

A Doesn't close it from my view at all.

Q Oh, no, I'm not saying it's closed from your view, I'm suggesting that it is a darkened corner, an alcove of the bedroom, and it's a lower level, isn't it?

A It's as low as this (indicating). It's not that low.

Q It's like two or three steps down, isn't it?

A Two steps.

Q Two steps. And as he stumbled and you heard that, and he didn't stumble in an upright position -- in a fall-down position, is that right? You're sure of that detail, that he didn't stumble down on his knees?

A I know that he was standing at the door. No, he didn't fall down on his knees. He just stumbled as you would if you missed a stair, and he caught himself on the door. He caught his balance and that made the door close.

Q And in that second, all that commotion was going on, you glanced over and you saw and you said, "Oh, he's as tall as my husband, give or take an inch or two"; is that

what you're telling this jury?

A Yes.

Q All right. Now, of course we don't know how tall Mr. Hollander was, but you've told us that he was 5'10", and that this man was between 5'10" and 6 feet, and the way you measured that was by seeing him lean against this door before he went out the door right after he had ravished you anally and vaginally?

A Yes.

Q And when did you make a note or refer to his height that you obtained at this moment; did you write it down right away that evening?

A I was taken to the police station and made a statement that evening.

Q Yes, but you weren't taken to the police station for hours later.

Did you after you saw him and realized he was about 5'10" to 6 feet tall, did you make a note anywhere in an effort to fix in your mind what this person was and what he looked like?

A I wouldn't have to write it down. I have it in my mind.

Q I see. And in your mind as this man left your bedroom after ravishing you, according to your testimony both anally and vaginally, that you rolled over and you made

a mental note as he went staggering out the door that he was 5'10" to 5'6" (sic); is that right?

A I had a mental picture. I know I've seen my husband stand at that door many times, it wasn't something I deliberately decided to make a mental note, I just remember things.

Q All right. You also told Mr. Berry that that person was slender, and I assume you're making that comparison with your husband again?

A I saw him. I know a slender person when I see a slender person.

Q All right. You're saying that slender in your mind is what you know when you see a slender person; is that correct?

A To me he was slender. You're not slender, he's slender.

Q I see. Would I be slender if I were compared with Lt. Rudy over there, (indicating), Rudy Jager?

A I don't know him.

Q Rudy, would you stand up, I want to get some perspective for the jury.

Am I slender compared to Lt. Jager?

A If I had to do a comparison, I don't know. I would probably say to somebody you were a little thinner than he, I wouldn't call you slender.

Q Well, between us, I'm the more slender; am I not?

A I might say that.

Q All right. So slender is something that's in your mind. That's slender.

How did you arrive at about a hundred sixty, sixty-five pounds; you told the jury that, how did you come to that number?

A Again, I guess I was judging by my husband's weight.

Q You did that at the same time that you were measuring his height as he was going out of your room?

A You get a mental picture of somebody and you have an idea of what they look like.

Q All right. So you had a mental picture of somebody between six-ten (sic)and -- 5'10" and 6 foot, about a hundred and sixty to a hundred sixty-five pounds; is that right?

A That's what I would have guessed.

Q All right. Is that what you told the police a few days later?

A It wasn't a few days later, it was that same night.

Q The very same night you told the police, right?

A That morning, I guess.

Q Okay. Can you remember what you told me that afternoon, that Saturday afternoon in your house?

A I probably told you the same thing.

Q When I asked you, Mrs. Hollander, if you could describe the defendant, did you tell me what he looked like and yes, you could describe him?

A I don't recall really what I said to you that day. I would have told you the same thing I would have told the police.

Q Would you have?

A Yes.

Q Did I ask you if you knew what color his eyes were?

A You have asked me that and I have told you I don't know the color of his eyes.

Q Did I ask you if you knew the shape of his nose?

A You may have asked me that. I don't know.

Q Do you know the shape of his nose from what you saw that night?

A No. I didn't remember.

Q Do you know the shape of his mouth?

A No.

Q Do you know whether or not his teeth were regular or missing or discolored or had any dentures or anything on?

A No.

Q You never saw his teeth, did you?
A No.
Q Never saw his mouth, did you?
A I probably saw his mouth. I don't remember.
Q What do you mean "I probably saw his mouth"?
A Well, I saw his face, so --
Q When did you see his face?
A I saw -- when he was beside my bed. He was -- when I turned and saw somebody beside my bed. I saw, you know, his face in the dusky room. I couldn't see the color of his eyes.
Q Couldn't see any of his features, either, could you? Could you?
A Not his features, I could see, you know, an outline of his head.
Q In other words, all you really know about the person that was in your room that night is that he was slender, by your definition, between 5'10" and 6 foot, as compared to your husband?
A That's what I would have judged him at.
Q Yes, and that he was Caucasian; is that correct?
A Yes.
Q You knew he wasn't a Negroid?
A No.
Q Did you know whether he was Hispanic?

A I didn't think so, no.

Q But you couldn't tell, could you?

A I would not have described him as Hispanic.

Q But you wouldn't know, you were sure that he wasn't Negroid?

A Yes.

Q How were you sure that he wasn't black?

A Because he didn't sound black. He didn't -- his skin wasn't black, his skin was white.

Q You could see his skin, couldn't you?

A Um-hmm (Affirmative). If he had been a black person, he would have been a very light black person.

Q Have you ever seen black people who were so light that you could almost -- could think they were white?

A A few.

Q I think you told the jury that he had a normal voice; is that right?

A Yes. In my description he did not have a southern accent, and he didn't have any accent that I recognized. So to me, from the middle west, I felt he had a midwestern voice.

Q And all of those are the total of what it is that you saw on the night of May 13th upon which you are predicating your ability to make an identification; is that right, is there anything else?

Is that correct, Mrs. Hollander, yes or no; you got to do for me just like you did for Counsel. I'd ask the Court to instruct you to give me an audible answer.

A Would you please ask that again?

Q No, I won't.

MR. BADER: Leslie, would you repeat it for the lady.

(Whereupon, the question was read back by the reporter as follows:

"Question: And all of those are the total of what it is that you saw on the night of May 13th upon which you are predicating your ability to make an identification; is that right?")

THE WITNESS: Yes, I guess. Yes.

BY MR. BADER: (continuing)

Q Is your answer "yes" that's the total of what you're basing your identification on?

A On what I saw.

Q That night we just described, if there's anything else, I want you to tell the jury now what it is that you saw or heard or observed on the night in question.

A I saw him once more from the window.

Q Okay. Tell that to the jury, now, what did you see from the window?

A I saw him run down the street past the window.

I mean, again, I got another look at his height, his build --

Q And that was from out of your bedroom window as he passed on the street in front of you?

A Yes.

Q While he was running?

A Yes.

Q And you made a mental measurement against the one that you had made earlier as he stumbled out of your room that he again looked 5'10" to 5'12" and a hundred and sixty pounds; is that correct?

A Yes.

Q Is there anything else, Mrs. Hollander?

A No, I don't believe so.

Q Well, maybe I can help you.

Did you following the events you've described to this jury assist a police officer from Punta Gorda in creating a picture or drawing of what the assailant looked like to you?

A Yes. Put together a composite.

Q That occurred where and when, ma'am?

A A few days later, I think, yes, a few days later.

Q At your house?

A At my house, um-hmm (affirmative).

Q And the police officer came to your house; didn't he?

A Yes.

Q Do you remember that officer's name?

A Yes. Detective Shoup.

Q And when he came, did he have a composite already prepared?

A No.

Q He didn't have one based upon his interview with you?

A He had -- no, I'm sure he prepared it there. He just, you know, put together a few things. He said, "Does this look like the man?" And then I said, made a change, and because he had too much hair on the first one that he put together --

Q Where did he have too much hair?

A On his head. He had, you know, like an afro-style almost. Looked like -- I said his hair was much shorter, so he changed it.

Q And did you assist him in picking out the other features of the face?

A No, I don't believe so. I think it was -- I don't believe there was much of anything else other than the hair was the only thing that I contributed.

Q Well, now, was there only one picture made?

A I don't understand what you mean only one picture.

Q Well, did you make only one composite for the

detective at your home that day?

A Yes.

Q Only one?

A Yes. We didn't make -- no, he wouldn't make more than one.

Q Is it your testimony you only made one?

That's what I want to get at, what did you do?

A First he made one and I said, "No, that's not right."

So he changed the hair, and I said, "That looks more like him."

Q All right. Now, the hair that you're referring to is the hair on top of his head?

A Yes.

Q And you're telling us that the first picture that he made was --

MR. BERRY: Your Honor, could --

THE COURT: Approach the bench.

(Whereupon, the following bench conference was conducted out of the hearing of the jury as follows.)

THE COURT: I'm going to do it right now: Quit flashing that thing in front of the jury. It's not in evidence. Quit flashing it in front of the jury.

(Whereupon, the bench conference was concluded and the following further proceedings were conducted within the

hearing and presence of the jury.)

BY MR. BADER: (continuing)

Q Now, pictures you made had hair that was like an afro, you said?

A Not that I made.

Q Well, the detective?

A The first one that the detective put together, the hair, you know, there was too much hair.

Q Well, I want you to tell the jury how the detective picked out that hair?

A He didn't, he just was putting some things together, then he said, "Does this look like him?" And that's when I said, "No, too much hair."

So he went into his little kit and he pulled out some other, you know, how they put together with these film things, they put on top, and he changed it.

Q Well, you are correct, I do know how they do it, but I'm not sure the jury does.

Where does he get the information about what to pick and what to pull?

A Where does the detective get the information?

Q Yes.

A Well, they have kits and they have general features that they put together and they get the -- hopefully the description from you, from the person describing.

Q All right. Then it was you who told the detective what your assailant looked like, that he used parts to put together, didn't he?

A He knew that I didn't have a good picture of his, you know, as I said, his nose and that, so he had a face put together, and as I say with the hair already -- he had a composite together when he came, or put it together -- put it together right there at my table, but before I looked at it, and then, you know, I told him how it differed from my picture.

Q Well, now, Mrs. Hollander, that wasn't the first time you had talked to this detective, was it?

A No, of course not.

Q You had talked to him before, hadn't you?

A He was at my home that night that this occurred.

Q And did you talk to him after that?

A This was only a day or two after, I don't -- I don't remember if I talked to him. I went down one day, and the next day I went that evening and made a statement, to another officer, I went the next day and had fingerprints taken, I don't remember when he did it, I don't remember who did it.

Q But you had told the police everything that you knew about the case prior to the time that the detective came to draw this picture?

A I tried to give them a full statement that evening when it was fresh in my mind. I don't remember giving them any other statement.

Q And on that occasion that you went and saw the police, when was that?

A You mean when I first went for fingerprints?

Q I don't know what you did, Mrs. Hollander, you're the one who's telling the story, and I don't know if you went for fingerprints first or the statement first.

A No, I had the statement first, on the way home from the hospital, we stopped at the police station and I made a statement.

Q Let me back up a moment.

I asked you if your identification of Mr. Hayes in this courtroom, what it was based upon, you told me, told the jury, that he was tall and slender and that he was white, that he had a normal voice, or at least he didn't have a southern accent. That's all you knew about him. You told us how you arrived at his height and his weight. I have asked you if there was any other way that you could have determined the description sufficient to point your finger, you knew you were going to be asked can you and will you stand and point to Mr. Hayes; or didn't you?

A I thought I would have to identify him, yes.

Q Yes, and before you came into this courtroom

whether it was yesterday or last week or last month or in the past year, you spoke with the prosecutor and he's asked you can you and will you stand or look and point at Mr. Hayes; hasn't he?

A He hasn't asked me that directly, no.

Q He hasn't asked you that question at all?

A No.

Q He has never said to you, Mrs. Hollander, can you identify Joe Hayes?

A He never asked me that directly.

Q What did he do, how did he get around --

A I've had very little discussion with him.

Q But when I took your deposition last year, you talked to him the day before the deposition, didn't you?

A We didn't talk -- discuss the case really, he just told me not to worry that he'd be there. We did not discuss the case or what I should say.

Q Mrs. Hollander, is it your testimony to this jury that the State of Florida represented by Mr. Berry or any of the Assistant State Attorneys has never asked you in so many words can you and will you identify and point your finger at this man and say that that is the man that was in my room on May 13th?

Is that what you're telling us?

A They have never said that directly to me.

Q Did you ever say to them that, "Yes, I can," did you volunteer it?

A I said that I hoped when I got into court that I would be able to identify him from my memory.

Q And from what else, ma'am?

A Just from what I remember. From what I -- from what I saw.

Q From what you saw where and when, ma'am?

A In my room.

Q Just what you saw in your room on the night in question?

A Right. That's the only time I've seen him.

Q That's the only time you've seen Joe Hayes?

A Yes.

Q Is that your testimony to this jury?

A Well, I saw him briefly --

Q Not just -- let me ask my questions.

Is your testimony to this jury that except at 2:30 in the morning on May 13th, 1980, some fourteen months ago, that you have never seen Joe Hayes until you came into this courtroom this morning?

A I saw him briefly in May when we were to have the other trial.

Q Where did you see him briefly in May?

A When he was in the courtroom.

Q Where was he sitting?

A At the counselors' table.

Q With me?

A Yes.

Q When you say "briefly", Mrs. Hollander, what do you mean "briefly"?

A Because I wasn't there very long.

Q Well, were you there five minutes?

A No, a couple of hours.

Q A couple of hours.

That's briefly?

A Well, I just didn't look at him very much.

Q You didn't look at him very much. Only two hours.

You and your daughters, Julie (sic) and Gail sat in the back of the courtroom and watched Mr. Hayes and me and the Judge and the court proceedings, didn't you?

A I was there for awhile, yes.

Q You were there when the Court began, weren't you?

A Um-hmm (affirmative).

Q And you were there when the Court ended, weren't you?

A No.

Q You left before Court ended?

A Yes.

Q Before the noon recess?

A I left at the noon recess.

Q Yes, you left at the noon recess.

And the Court began at 9:00 or 9:30, didn't it?

A I don't remember what time you came in.

Q And you stayed until 12:00 noon, until the Judge recessed the proceedings. That's the brief time that you watched Joe Hayes, isn't it?

A Well, I didn't really watch him very much.

Q I see.

A I saw him, but that was the only time.

Q Now, ma'am, let me help you some more; do you read the newspapers?

A Yes.

Q Do you read the Fort Myers News Press?

A Yes.

Q And the Punta Gorda Herald News?

A Yes.

Q You have previously told me that, haven't you?

A Yes.

Q And you read them every day, don't you?

A Yes, most every day.

Q You're a literate and educated woman, aren't you?

A I guess so.

Q And you have read all the newspaper accounts of this case, haven't you?

A I've read quite a few.

Q And you have saved them, haven't you?

A I have some of them, um-hmm (affirmative).

Q You've kept them at home?

A (No audible response.)

Q I can't tell when you shake your head what your answer is.

A Yes.

Q And did some of those newspaper accounts carry photographs of Mr. Hayes?

A Yes.

Q And did you read them?

A Yes.

Q And look at them?

A Yes.

Q I show you what's been identified by the Clerk as a News Press for Wednesday, May 13th --

MR. BERRY: Mr. Bader, are you having that marked for identification purposes?

MR. BADER: Yes.

MR. BERRY: Thank you. May I see it first? (Examining.)

THE CLERK: What are these to be marked?

MR. BERRY: I have no idea.

THE CLERK: I'd like to be informed.

MR. BADER: What?

THE CLERK: Do you want these as Defendant's Exhibits?

MR. BADER: Yes, ma'am, Defendant's Exhibits 1, 2, 3, whatever order I give them to you.

(Whereupon, Defendant's Exhibits Number 1, 2, 3 were marked for identification purposes only.)

BY MR. BADER: (continuing)

Q I show you what's been marked as Defendant's Exhibit 1 for identification and ask you if you've ever seen it before.

A (Examining.) Yes.

Q Does that have a picture of Joe Hayes in it?

A Yes, on the back.

Q Did you read that paper?

A Yes.

Q I show you Defendant's Exhibit Number 2 for identification and ask you --

THE COURT: Mr. Bader, please don't exhibit those to the jury. They're not in evidence. You're continuing to do this, this is the second time. You did that awhile ago. Watch that.

MR. BADER: I'm sorry.

THE COURT: Nobody wants to have to try this thing over again.

MR. BADER: No, sir.

BY MR. BADER: (continuing)

Q Did you read that paper?

A No.

Q Does it have a picture of Joe Hayes on it?

A It does.

Q Do you recognize the picture?

A I've never seen it before.

Q But do you recognize the picture?

MR. BERRY: Your Honor, I'm going to object to this line of questioning. If this is for the purpose of identification, she's answered that she doesn't know, that she's never seen it.

THE COURT: Objection be sustained.

BY MR. BADER: (continuing)

Q Exhibit 3 for identification.

A (Examining.) Um-hmm, I saw this.

Q You saw that, does it contain a picture of Joe Hayes?

A Yes, it does.

Q Thank you, ma'am.

When was the first picture of Joe Hayes that you saw?

A The first time I ever saw a picture?

Q Yes, ma'am.

MR. BERRY: Your Honor, at this point I'm going to object, are these being put into evidence or are they being placed for identification and stopped there.

MR. BADER: At this point that's all I'm doing. If I may be allowed to go through with my cross examination, it's very difficult, Judge, and I've got a hostile witness, and I'd like not to be interrupted.

THE COURT: You've got an adverse witness, she's not a hostile witness. They have been exhibited to the jury, however, I'm specifically instructing the jury to disregard any pictures that you may have seen in the hands of the defense attorney. They have no place at this point. They may have later, but not at this point.

MR. BADER: Leslie, read it back.

(Whereupon, the last question and answer were read back by the Reporter as follows:

"Question: When was the first picture of Joe Hayes that you saw?

Answer: The first time I ever saw a picture?

Question: Yes, ma'am.")

BY MR. BADER: (continuing)

Q Would you answer, please?

A Shortly after Mr. Hayes was arrested. The police officers brought some pictures to my house, it was a lineup

of six or seven people.

Q All right. Let me stop you at that point.

Can you put a date on that occasion?

A If I had my calender here I could. It was in June, about six weeks after the attack. I believe. I don't remember the exact date.

Q What was the date of the attack?

A May 13th.

Q And you think it was approximately six weeks after that?

A Yes. I think it was the day after he was arrested, I'm not certain of the date.

Q Okay. Did you see the newspaper account of his arrest that day?

A That day, no.

Q The day after he was arrested?

A I'm sure I did, because it was after the police officers had been there.

Q Well, I don't know whether it was or not, but did you read the newspaper --

MR. BERRY: Your Honor, I'm going to object to Mr. Bader testifying. He's asked her a question, and she's answered, and he comes back and says, "I don't know whether it was or not."

That's not proper for him to do. He can ask her

the questions and she can answer them.

THE COURT: Objection be sustained. Counsel cannot testify.

MR. BADER: No, sir, I apologize. I really didn't think I was testifying, I was trying to get my thoughts in order, but I understand the State's anxiety, and I apologize for thinking out loud and trying to frame my questions.

BY MR. BADER: (continuing)

Q Mrs. Hollander, did you read the newspaper account of Mr. Hayes' arrest the first day it appeared in the newspaper?

A The first -- I don't know the day he was arrested. You know, I didn't know it that day, I didn't know it until the next day, so I don't know whether it was the first day it was printed or not.

Q Whether or not if it was the second day?

A Well, I did read about his arrest in the paper.

Q Yes, you did, and you saw the pictures in the paper that was published with that story?

A If there was a picture. I don't remember.

Q You don't remember?

A No, I really don't.

Q Whether you saw a picture of the alleged person shown to be arrested.

Did you read the account of his arrest?

A I'm sure I did.

Q In which paper?

A I don't know.

Q Which papers did you read that day?

A I mean, I just don't know which paper it came out in. I read the two papers. So whatever was in the two papers, I read.

Q In the Fort Myers News Press and the Punta Gorda Herald News?

A Um-hum (affirmative).

Q You read them every day?

A Unless the Herald News isn't delivered.

Q And you did read those accounts and you saw the pictures if, indeed, there were pictures with those accounts?

A I read the papers, so whatever was there I read and I saw.

Q All right. Now, if you remember, the question was what other opportunities have you had to see the defendant before you made your identification in court today, have you ever seen the defendant under circumstances similar -- similar to those that occurred on the night of May 13th?

A No.

Q You have never seen the defendant in a darkened room against a wall in the split few seconds, you have never

been taken any place and shown Mr. Hayes in a darkened room and all he did was let you open the door and look at him in the dark, near as you can describe it to the way it was the night in question, and then take you away and say, "Now give me a description of him"?

A No.

Q Or identify him?

A No.

Q Have you ever been taken anywhere at any time by anybody and shown any other six-foot-ten or twelve (sic) slender, white, Caucasian individual to see if they looked like the person that you said you saw on May 13th in your bedroom?

A No.

Q Have you ever been taken at any time anywhere by the police in an effort to determine your ability to identify this defendant as the person you saw in your room?

A No.

Q Is the only evidence of his identification to your knowledge, your personal knowledge, that few seconds as he left your room and again that few seconds as he ran by in the street outside your bedroom window?

A I'm afraid I lost part of the track.

Q Do you.

A Is that the only time --

Q Did you lose track of what I'm saying?

A I'm sorry, I -- I don't --

Q Is that what the problem is, you lose track of what I'm saying, or do you lose track of what the answer has to be?

A No, sir. I just don't know whether there is more. The police did bring pictures for me to look at to pick out from the lineup.

Q I didn't ask you that.

A All right. That's what I wanted to know, whether that was the question.

Q Do you know the question?

A Have I seen him any other time?

Q In any other circumstance or any other person.

A Or any other person? I don't understand that part.

Q Are you confused, Mrs. Hollander?

A This question has me confused. Would you please ask it again?

MR. BADER: Yes, I'll be very happy to. Leslie, will you go back and find my precise question and ask her again?

(Whereupon, the question was read back by the Reporter as follows:

"Question: Is the only evidence of his identifi

cation to your knowledge, your personal knowledge, that few seconds as he left your room and again that few seconds as he ran by in the street outside your bedroom window?")

THE WITNESS: All right. The first part, the only evidence of his identification, and I'm thinking of the pictures, now that I'm excluding those, no. I mean, that was part of the identification, looking at the pictures that the police have.

BY MR. BADER: (continuing)

Q In other words, you're saying that your identification in the courtroom today is based upon pictures brought to you by the policemen; is that right?

A Was partly from the pictures that I identified this was the person, and they said that was the person they had arrested.

Q You are relying upon pictures brought to you by the police?

A No. I'm not.

Q Did you take those pictures?

A I'm not relying on that.

Q. Did you take those pictures?

A No.

Q Do you know whether those pictures are representations of Joe Hayes or not?

Did you know Joe Hayes beforehand?

A No.

Q Did you have any idea what he looked like before the night of the 12th, the 13th?

A No.

Q But your identification today is in addition to the statements made by you of his description in the room and the pictures of the officer that brought with him to you, that's what you're basing your identification on?

A On what I saw that night.

Q And what the policeman brought to you and showed you; is that right?

A And on the pictures that I identified.

Q That the policeman brought to you?

A Yes.

Q After you read the story in the newspaper, correct?

A I don't know whether it was after or before.

Q You don't know.

A I think it was the same day.

Q I think it was. I think it was.

MR. BERRY: Your Honor, I'm going to object one more time of his trying to testify.

THE COURT: Sustained. Counsel cannot testify.

///

BY MR. BADER: (continuing)

Q You told the jury, whether it was Mr. Berry's or my question, that you went to the police and gave them a statement; is that correct?

A Yes.

Q Did you sign that statement?

A Yes.

Q Do you recall how many pages the statement was?

A I think it was three.

Q Can you recall whether it was a statement you wrote out in longhand or a statement that was transcribed on a tape recorder and later typed up?

A It was on a tape recorder and typed later, typed up and I signed it the next day.

Q And did you read it over?

A Yes.

Q Have you, other than the day you read it and signed it, have you read it any time since then?

A No, I've never seen it again.

Q Well, now, that's not exactly correct, is it, Mrs. Hollander? Didn't you see it with me in the courthouse in Punta Gorda?

A I don't believe I looked at the statement that day.

Q Didn't I have you identify it, show it to you?

A I didn't read it. I identified my signature at the bottom, was that right?

Q But you didn't read the statement?

A I didn't sit there and read it through.

Q Did you read it the day before in Mr. Berry's office?

A No, I did not.

Q Were you in Mr. Berry's office the day before?

A I was in his office.

Q Because you knew you had been subpoenaed to give your deposition to me on behalf of Mr. Hayes, hadn't you?

A That's right.

Q You went down and visited with Mr. Berry, didn't you?

A Yes.

Q And he didn't give you a copy of your statement to help you?

A He did not.

Q And you have never seen it even to this day?

A I have not read it again, no.

Q You have never read it again?

A No.

Q Have you done anything to help refresh your memory concerning the details of the night of May 12th, the morning of May 13th?

A I have gone over it in my mind.

Q Did you go over the newspaper articles and the pictures?

A No, sir.

Q You didn't do that?

A No, I didn't.

Q You have never gone over them?

A In the year and a half I may have looked at them, I did not look at them before this trial.

Q Did you look at them before the trial back in May?

A No, I didn't.

Q Of this year?

A No. I have tried to refresh my memory just by thinking about it so that I would have things in order in my mind. I know what happened, I know what I had to say to give it in order.

Q What did you know you had to say?

A I had to tell them what happened that night. I had to remember what he said, and I thought about it in the evenings before the trial so that I would be able to recall it and retell it.

Q Mrs. Hollander, tell this jury whether or not in your opinion your memory was better on the day or two after the alleged rape and your memory today?

A I don't know whether my memory is better now or

then. I try to remember as well and as accurately as I can.

Q Mrs. Hollander, do you believe that your memory is as good today as it was the day or two after the rape?

A (No audible response.)

Q Is that what you want the jury to believe, that it doesn't make any difference?

A I think I would -- I think I remember it as well.

Q You think you do? Did you ever come face to face with this defendant?

A Not until today.

Q You were face to face with him in the courtroom in Punta Gorda six weeks ago?

A No, I was sitting behind him. I saw him from behind. I have not been face to face with him before.

Q You saw his pictures before, face to face, once you identified and said that you --

A The one, the police pictures, that's true.

Q And the newspaper pictures?

A They were not -- most of them were from the side or from the rear.

Q Well, isn't that the way you saw him?

A I saw his face. I saw him head-on when he was beside the bed. I saw the shape of his head directly on.

Q When he was crouching down by your bed you saw him head-on?

A Yes.

Q Was that when he was leaning up and rubbing your body?

A (No audible response.)

Q Mrs. Hollander?

A Yes.

Q And you awoke; is that right?

A Yes.

Q And you had this funny sensation, didn't you?

A I turned and expected to see my daughter.

Q Because your daughter used to come into your room and rub your body and --

A No.

Q -- wake you up?

A Sometimes if she had something she wanted to tell me, she'd been out, I thought she had something she wanted to tell me, she would come in and shake me.

Q Shake you on your leg, rubbing it up and down?

A No, but I didn't know what was happening at the time I awoke. I had been asleep.

Q You were sound asleep is what you told the jury?

A I was -- I was sound asleep.

Q You were over on your right side, weren't you? (Demonstrating.)

A I was on my right side.

Q And you leaned up on your right elbow, didn't you? (Demonstrating.)

A That's right.

Q On your elbow, and you looked over your left shoulder? (Demonstrating.)

A Um-hmm (affirmative).

Q In the dark, out of a sound sleep, Mrs. Hollander?

A Um-hmm (affirmative).

Q Expecting to see your daughter?

A That's right.

Q But you saw somebody else's face that you didn't recognize?

A That's right.

Q And you heard a voice that you didn't know, what did that voice tell you?

A I knew when I heard a man's voice that there was a stranger in my room, and my instinct told me what was about to happen.

Q What did your instinct tell you?

A That there would only be one reason to have a strange man in your room crouched beside your bed.

Q Didn't you think it might be your husband, Mrs. Hollander?

A It wasn't my husband's voice, it wasn't his shape. I would recognize my husband even in the dark.

Q And you screamed?

A No.

Q You didn't scream?

A No.

Q What did you do?

A There wasn't much time to do anything.

Q Why didn't you scream, Mrs. Hollander?

A I wouldn't have screamed. I didn't want to arouse my daughter.

Q In that split second you looked and made all of these determinations and decided that, "I won't scream because if I do that will arouse my daughters"?

A I didn't really have time to think about it, but it wouldn't have done any good in my house to scream, anyhow, my daughter upstairs couldn't possibly have heard anything. It's too far away.

Q You thought of all of that while you were laying there?

A You think of a lot. Have you ever drowned? You think of a lot. Things are racing through your mind rapidly.

Q But you didn't scream, didn't shout out for help?

A There wasn't anybody to call for help, and I didn't want -- I wouldn't have wanted my younger daughter to come running, anyhow.

Q That's what you thought of that moment, "I don't

want my daughters here, let him rape me, but I don't want help, I don't want anyone to call for the police"?

A They wouldn't have heard me.

Q You decided that they wouldn't hear you?

A I knew they wouldn't. They're hard enough to wake up.

Q You think a screech in the night by you would have gotten no relief and no assistance from anybody?

A I don't believe I would have been heard. I don't think I could have. I didn't have time, anyhow, because he immediately clamped his hand over my mouth and threatened me, told me not to scream.

Q Mrs. Hollander, you have told this jury that you came up on your right elbow and looked over at the head and face of your assailant; is that correct?

A That's right.

MR. BADER: Would you mark this, please, as Exhibit 3 for identification?

THE CLERK: Four.

MR. BADER: Four. Thank you.

(Whereupon, Defendant's Exhibit Number 4 was marked for identification purposes only.)

BY MR. BADER: (continuing)

Q Do you have a present recollection of what you told the police officer when you gave him your statement?

A You mean the whole statement?

Q Not word for word, but what you told him.

A Well, I told him what I told here when Mr. Berry told me to describe what happened.

Q I'll ask you to look at what's been marked as Exhibit 4 for identification. I'll show you that it consists of three typewritten pages that you have previously described as the statement you made.

I ask if you'll look at the bottom of each page and tell me if your signature appears thereon.

A (Examining.) Un-hmm (affirmative).

Q Have you seen that statement before, and is that your signature?

A Yes.

Q All right. I would direct your attention to the last two lines --

MR. BERRY: Your Honor, I'm going to object at this point. He's offered that for identification purposes only. She's identified it. If he now introduces it into evidence, if not, I'm going to object to anything in it at this point.

THE COURT: At this point all he's done is direct her attention to the last two lines. I don't know how much further we'll go beyond that.

THE WITNESS: (Examining.) Yes, sir.

BY MR. BADER: (continuing)

Q I direct your attention to the last two lines --

A Um-hmm (affirmative).

Q Have you had an opportunity to read them?

A Um-hmm (affirmative).

Q May I have it, please?

I'll ask you now, Mrs. Hollander, did you ever come face to face with Joseph Hayes on the night of May 13th -- May 12th this last year?

A I know what that says, I was -- at the time I gave that statement I was thinking of it in a different context, that I did not come face to face with him during the actual attack. He always attacked from the rear, but I wasn't referring to when I turned -- when I turned on my right elbow and turned and looked and saw that it wasn't my daughter's head.

Q I ask you to tell me where in the two lines that you just read it explains what you have just told --

MR. BERRY: Your Honor, I'm going to object.

BY MR. BADER: (continuing)

Q If it does --

MR. BERRY: He's trying to go into something that has not been introduced into evidence. If he wants to introduce that into evidence, he knows how to make the proper motion.

THE COURT: Sustained.

BY MR. BADER: (continuing)

Q Now, I'll ask you did you make that explanation to the police officer when you made this statement?

A I didn't. If I made any other explanation it would be in there, I guess.

Q Did you tell the police officer, "I never came face to face with my assailant"?

A During the attack.

Q I didn't ask you that question. I know what you're trying to say now --

A Well --

Q I'm asking you if on the day or two following the assail (sic) -- the alleged rape, did you tell the police officers, "I never came face to face with my assailant"?

A (No audible response.)

Q Just yes or no.

A (No audible response.)

Q Did you tell that to the police officer?

A (No audible response.)

Q Is it so hard to say yes, Mrs. Hollander?

MR. BERRY: Your Honor, he could ask her the question, I don't think he's got a right to comment on her answers.

THE WITNESS: I said that in the statement.

BY MR. BADER: (continuing)

Q That "I never saw the assailant face to face"?

A That is what I said in the statement.

Q Thank you, Mrs. Hollander.

Mrs. Hollander, how was your assailant dressed that night?

A Shirt, pants.

Q What kind of shirt did he have on?

A I don't know.

Q Well, comparing it with her husband, what kind of shirt did he have on?

A I don't know.

Q What kind of pants did he have on?

A I don't know that, either.

Q You have no recollection of the kind of shirt or pants that he had on?

A No.

Q You wouldn't know whether the shirt had buttons or was a slipover, you wouldn't know whether the pants were denim or khaki, or sports pants or long pants or short pants?

A No.

Q Did you ever see the sexual organs of your assailant?

A No.

Q You told the jury that his first words were, "Be

quiet", and that his first actions were to feel your body.

What was it he told you he wanted to do?

A His first words were, "I want to feel your cunt."

Q Did he?

A Yes.

Q How did he feel your cunt, Mrs. Hollander?

A With his hand.

Q With his hand.

Can you tell me what you mean he felt it with his hand? Can you describe for this jury what conduct made you believe his hand was on your cunt?

A Well, you certainly can tell a man's hand. He had grabbed my right arm with his right arm --

Q He had your right arm, we know he was behind you, wasn't he, and on top of you?

A That's right.

Q Not face to face, but --

A Yes, that's what I meant, not face to face.

Q He was on top of you, from your back, and you were lying in your bed; isn't that correct?

A That's right.

Q With your cunt to the bed, Mrs. Hollander?

A Yes.

Q And his right hand around your right arm, Mrs. Hollander?

A It was his right hand that was over my mouth.

Q His right hand was over your mouth as you lay on the bed?

A His left arm grabbed my left arm.

Q He grabbed your left arm with his left arm?

A Then he --

Q Then he what, ma'am?

A That's when he pinned me down with his weight on top of mine.

Q Yes, ma'am.

A My right arm was then pinned under me.

Q Your right arm was now pinned under you, he let loose of your right arm?

A He didn't have ahold of my right arm, he had his hand on my mouth.

Q On your mouth?

A His left arm had ahold of my left arm.

Q Yes, ma'am.

A He had my right arm pinned under my body. Then he released my left arm, with hisweight was able to hold me down, and with his left hand free now is what he felt my body with.

Q How did he feel your body?

A (No audible response.)

Q What did he do?

A He explored my body with his hand. He touched my

breasts, he ran his hand up and down my side. His hand, his --

Q His left hand. He released your left arm and he was now exploring under -- between the bed and your body, and felt your breasts, is that right?

A That's right.

Q How long did he feel your breasts?

A Not very long. He was impatient.

Q Where was his right arm at this point?

A I don't know.

Q Did he ever turn loose of your mouth?

A Yes. At some point he did.

Q Then after he felt your breasts, what did he do with your breasts, Mrs. Hollander?

A Nothing. He just touched it.

Q Well, were you able to tell -- did he touch it with his fingertips, did he touch the nipple, did he massage it, did he grab it, did he squeeze it, what did he do?

A He just very quickly touched it. He really didn't know what he was doing.

Q He didn't know what he was doing.

A He just, you know, he was very frantic, impatient, he was very tense.

Q You could tell all of that?

A His heart was beating rapidly, hard, I could feel

it against my back.

Q And then where did his hand go after it briefly touched your breasts?

A Well, I told you that he penetrated the vagina with his penis.

Q No, ma'am, we're not talking about his penis now. We're talking about his hand.

A Well, that's probably where his hand went.

Q You said that he touched your cunt, and I want you to tell me how and when and what he did that lets you tell this jury that that is what you know he did.

THE COURT: We will be in recess until 1:24. While you are gone, do not discuss the case among yourselves, allow no one to discuss it with you, arrive at no conclusion.

Arrangements have been made for you to be guests of Charlotte County for lunch. See you at 1:24.

(Whereupon, the jury retired from the courtroom at 11:54 A.M. for the lunch recess.)

MR. BADER: At this point for the record I would note my objection to the recess called without any forewarning to my cross examination at this point.

THE COURT: Object all you want to.

(Whereupon, the lunch recess was taken.)

(Whereupon, after the lunch recess, the following

proceedings were had in Chambers.)

THE COURT: Prior to the lunch break I stopped this case for recess in the middle of cross examination. I am here to state right now that the Defendant has a right to cross examine in detail. Cross examine in detail anything the Prosecution has to say. But I am also saying that it's gone past the bounds of reason and good taste by the use of the word "cunt" many times by Defense Counsel in a manner which I perceive to be in total harassment of the witness. You will be permitted, and I am speaking to Bob Bader right now, you will be permitted to cross examine to your heart's content, minute details, the time will not be limited. But you will not use the word "cunt" unless you have an occasion to use it as a quote as the witness has stated that the Defendant said. You will not lie down on the floor and assume positions that you consider to be what the witness testified to as you did do.

Now, this has got to the point where it grossed me out, and I'm hard to gross out. It grossed out Owen Lucky, a local attorney, and he's hard to gross out. And the Clerk, who happens to be a female lady, came through here with tears in her eyes. She had all of it she could stand. If it happens one more time, I will proceed on under the provisions of Rule 3.830,

Rules of Criminal Procedure, pertaining to contempt, and I'm giving you fair warning of it. I'm not here to argue with you, so you needn't say anything to me. If you want to put it on the record, have at it.

MR. BADER: No, sir. I'm not proposing to argue with you, but I do need some guidelines as to what you're talking about.

THE COURT: Let's go.

MR. BADER: I don't -- but I'm not apprised of what it is that you're talking about.

THE COURT: If you want to refer to any part of the human anatomy, you will do so with the proper physiological terminology. The word "cunt" is a gutter slang term, and it will not be used in my courtroom other than as is absolutely necessary, and we are past that point.

(Whereupon, the in-chambers conference was concluded.)

(Whereupon, Court reconvened at 1:24 p.m. and the following further proceedings were conducted within the hearing and presence of the jury.)

THE COURT: You may be seated. You may proceed.

MR. BADER: (Indicating.)

Whereupon, the following bench conference was conducted out of the hearing of the jury as follows.)

THE COURT: Start wherever you want. We'll start back on the record. You can ask any questions you want.

MR. BADER: The question of whether or not the directions of the Court are clear enough to me, so that I don't get myself in a bind with the Court.

THE COURT: I think you know how not to get yourself in a bind. I think it's been perfectly well explained. Now you may proceed.

MR. BADER: Well, I want the Court to be aware that I am not satisified that I understand what the Court's getting at.

THE COURT: You want to let the jury out and argue with me awhile? Because I'm not going to argue with you.

MR. BADER: I don't want to argue with you.

THE COURT: Okay. Let's go. It's your time, you're on cross examination. Move on.

(Whereupon, the bench conference was concluded and the following further proceedings were conducted within the hearing and presence of the jury.)

MR. BADER: Leslie, would you read for me, please, the question, the last question, the point where the Court interrupted me, the response, and recessed, whatever it was that was going on?

THE COURT: I have instructed the Court Reporter that she will not go back and read anything that has been previously said. You can start at this point and go forward. Any question that you think is proper.

MR. BADER: Judge, may I ask the jury be excused, then, so that I can get my question and answer back?

THE COURT: You may.

MR. BADER: Thank you.

(Whereupon, the jury retired from the courtroom at 1:25.)

THE COURT: Leslie, you may read the last question asked prior to the recess. You will not go back any further than that.

(Whereupon, the following question was read back by the Reporter as follows:

"Question: You said he touched your cunt, and I want you to tell me how and when and what he did that lets you tell this jury that that is what you know he did.")

THE COURT: Now, if you want to rephrase that question without the use of the offensive word, you may do so. But you will not use that word again.

You may bring in the jury.

(Whereupon, the jury returned to the courtroom and the following further proceedings were conducted.)

BY MR. BADER: (continuing)

Q Mrs. Hollander, you were describing when we were interrupted in the middle of your testimony, the conduct of your assailant, and you described that this hand had touched your body, and I asked you where and how and what he actually did, when you said he touched that part of your body that we will call generically or physiologically your vagina.

Can you tell me, describe for this jury, the conduct of your assailant in that respect?

A He -- it was after he had grabbed my arms and had thrown himself upon me. Then he reached under my nightgown and felt the vagina with his hand and then that's when he --

Q Ma'am, when you say he "felt", can you tell me, or tell --

A He just touched me.

Q But I don't know what you mean when you say "he just touched me", which hand did he use?

A His left hand.

Q And what part of his hand did he use?

A His fingers.

Q Did the fingers enter your vagina?

A No, I don't think so. No.

Q Ma'am, I thought you said, "No, I don't think."

A No.

Q Do you know?

A No, it didn't.

Q They never --

A He touched the outer part.

Q What outer part?

A (No audible response.)

Q What outer part, Mrs. Hollander?

A The outer part of the vaginal area.

Q With his fingers?

A Yes.

Q How is that you're certain, if you are, that no part of his fingers entered into your vagina?

A Well, I don't -- I don't see what difference that would make one way or the other anyhow.

Q Mrs. Hollander, it isn't my place to explain what difference it makes. I can't answer your question. It is important, and in determining the totality of this evidence that you answer my question.

Would you please answer my question. Take as long as you wish to think about it.

A At the time you aren't exactly keeping a record of exactly how things are happening. Things are just happening. I know that he reached under my nightgown and that he touched me, but shortly after that he raped me.

Q Mrs. Hollander, I didn't ask you that question.

MR. BERRY: Your Honor, I'm going to object to his comments as to her answer. Now, he can cross examine her, and she has given the best answer that she can. I don't think it's fair for him to comment on her answers.

MR. BADER: I would respectfully request the Court to instruct the witness to answer the specific question, her answer was not responsive to my question.

THE COURT: Mrs. Hollander, the Defendant, through his attorney, has the right to examine or cross examine, as it is, in detail the events to which you have testified. You should answer whatever question he asks unless there is an objection as good as you can. Now, there may be answers that you cannot give a yes or no to, so say so to the best of your recollection. You must answer the question.

MR. BADER: Leslie, would you read the question, please?

THE COURT: I will add to that and say, emphasize, to the best of your recollection. If you don't know, say you don't know. And you do not have to answer any question that is not asked.

Now, would you read the last question back?

(Whereupon, the question was read back by the Reporter as follows:

"Question: How is it that you're certain, if you are, that no part of his fingers entered into your vagina?")

BY MR. BADER: (continuing)

Q Do you now know the question, ma'am?

A I do not believe that he -- I don't know if he put his fingers in. I don't know. I don't think so.

Q Did you at any time ever advise the police that he entered your vagina with his fingers?

A I -- no, I don't believe so.

Q Did the police ever ask you?

A No.

Q Did Mr. Berry ever ask you to explain in detail what conduct your assailant did that night?

A No.

Q During the noon recess, did you have an opportunity to review your statement made to the police the day of the assail (sic) on you?

A No.

Q You have not read it?

A I have not read it.

Q Have you discussed it with anybody while -- during the noon recess?

A I didn't discuss the case with anybody during the noon recess.

Q After he put his hand on your vagina, what next did he do, specifically?

A He penetrated the vagina with his penis.

Q How were you able to tell that he penetrated the vagina with his penis?

A Because he was close to me, because it felt like it.

Q When you say "it felt like it", Mrs. Hollander, what are you saying, what do you mean, would you explain it, please, to the jury?

A (No audible response.)

Q If you can?

A Well, it didn't feel like a finger. It was larger. He was very close to me. He couldn't have had his hand in between himself and me.

Q He couldn't have his hand in between himself and you.

A No. And besides, he was using that hand at that time to feel my breast, and other areas, running his hand up and down my body.

Q Are you saying that your assailant was feeling your body, holding your mouth, and --

A No. He was no longer holding my mouth.

Q I'll rephrase it.

Are you saying that your assail was feeling your

body from your breasts to your vagina, and at the same time copulating with you?

A Yes.

Q Is that what you're saying?

A Yes.

Q That it was all going on simultaneously?

A Yes.

Q Even while his hand was moving from your breast to your vagina?

A Yes.

Q And on top of you, and had his penis in your vagina, and you could feel it, and you could tell it, and you knew it was different from a finger?

A Yes.

Q Is that what you're saying?

A Yes.

Q You said the penis was larger than a finger.

A Yes.

Q Whose finger were you comparing it with, Mrs. Hollander?

A No one.

Q Mrs. Hollander, do you now, in that witness chair, under oath, in this courtroom, can you look at that jury and say that you know that that man who you said was your assailant never put his finger in your vagina, but he put

his penis in your vagina; can you look at the jury and say that, ma'am?

A Yes.

Q Can you look at the jury and say that?

A Yes, I can look at the jury and say that.

Q Say it, ma'am.

A (No audible response.)

Q Say it.

MR. BERRY: Your Honor, I don't think he can instruct her what to say, that's ---

THE COURT: Objection be sustained.

You can ask questions, but you cannot command a witness to do anything.

BY MR. BADER: (continuing)

Q Can you say it, ma'am?

A Yes, I can say it to each and every one of you.

Q Will you say it to them?

A The man sitting in this courtroom entered my home on the morning of May 13th and raped me.

Q I asked you if you would state to them that he put his penis and not his finger into your vagina.

A Yes. He put his penis and not his finger into my vagina.

Q Do youhate Joe Hayes, Julie Hollander?

A No.

Q Do you hate me?

A I -- no. I do not hate Joe Hayes.

Q Just me?

A (No audible response.)

Q Is that the way you feel, Mrs. Hollander?

A Mr. Bader, you have been antagonizing me for several months.

Q Did I antagonize you the day I came to your house with my wife?

MR. BERRY: Your Honor, at this point I'm going to object to any further lines along -- this has nothing to do with the --

THE COURT: Objection sustained.

MR. BADER: May I be heard at all?

THE COURT: No, sir, you may not be heard. You may continue. The objection has been sustained. What the witness thinks about you has nothing to do with it.

MR. BADER: It has to do if -- I must be heard, if we could excuse the jury, that I may be heard.

THE COURT: Mr. Bader, I told you, you may proceed.

BY MR. BADER: (continuing)

Q How long did this entire episode take, Mrs. Hollander?

A Maybe ten minutes. I don't know. It seemed like

half an hour, but I know it wasn't that long. It seemed forever.

Q But you think it only took ten minutes?

A Ten, probably.

Q Is that what you told Officer Marvin when you gave your statement?

A I don't remember if I -- what length of time I said.

Q Do you recall what you told Officer Marvin about the height of the defendant?

A I believe I told him 5'10", because -- I really thought more like 6 feet, but I thought I might be exaggerating. So I said 5'10".

Q Why would you exaggerate, Mrs. Hollander?

A I thought he might appear taller to me because he was slender. So I didn't want to exaggerate, because they'd be looking for the wrong person.

Q Did you ever tell Officer Marvin that the assailant was slender?

A I don't recall, I probably did. Slender, slim, I don't know.

Q Is there a difference between slender and slim, Mrs. Hollander?

A They're about the same. Just probably used one of those words, I don't know which term I used.

Q Mrs. Hollander, is there in your mind any difference when you describe a white male who you said is a certain height and was your assailant, whether you call that person slim or slender?

A To me they're the same.

Q There's no difference, whatever?

A No.

Q So that a person who was 6 feet tall and a 160 pounds, as you described, could be slender or slim, even if that person was 6 feet tall and only a 120 pounds?

A Then I'd call him skinny.

Q Then he'd be skinny.

Well, between 20 pounds and 60 pounds, so I guess he's got to be about a 140 pounds, would that make him slender?

A (No audible response.)

Q Would it, ma'am?

A I suppose so.

Q And when would he become thin, where does that fit in?

A I don't know.

Q How about emaciated, does emaciated fit in with those other words in your mind, because it's your testimony-

A No.

Q It doesn't fit in?

A No.

Q Did you tell Officer Marvin that he was 5'9" or maybe 10, compared to Officer Marvin?

A I don't believe I compared him to Officer Marvin.

Q Well, did Officer Marvin compare himself and ask you to look at him?

A No, I don't think he did.

Q Did Officer Marvin tell you, well,"I'm 5'9", how tall is he? I'm standing here, I'm 5'9" -- "

A No, I don't believe he referred to himself.

Q Do you remember?

A (No audible response.)

Q Do you remember, Mrs. Hollander?

A I'm sure he didn't refer to himself. I think I just told him what I thought.

Q I asked you to look on page three of the statement you made --

MR. BERRY: Your Honor, at this time I'd like to approach the bench.

THE COURT: All right.

(Whereupon, the following bench conference was conducted out of the hearing of the jury as follows.)

MR. BERRY: Your Honor, I'm going to object to anything -- in referring to that, he's had it marked for identification purposes only. She has identified

it. Now if he wants to put it into evidence, let's go the proper route, but he's trying to put it in in the back door.

THE COURT: You can ask if she made the statement. You can show the statement to refresh her memory, then she can answer what she wants to.

MR. BERRY: Thank you, sir.

(Whereupon, the bench conference was concluded and the following further proceedings were conducted within the hearing and presence of the jury.)

BY MR. BADER: (continuing)

Q I ask you to look at page three, at the line where my thumb is, and ask you if that helps to refresh your memory.

A (Examining.) Yes.

Q Okay. Now, I ask you again, did Officer Marvin suggest to you what his height was and ask you to make a comparison between his height and that of the assailant?

A It was after I had stated that I thought he was 5'10" that Officer Marvin said that he was 5'9". And did that compare, I had already stated that he was 5'10".

Q Mrs. Hollander, Mr. Berry can redirect you and explain all your answers. I didn't ask you that.

I asked if Officer Marvin had ever said, "I'm 5'10", tell me what his height is."

Now, did he do that?

A He asked that afterwards. He said that afterwards. I had already said --

Q Ma'am, that wasn't my question --

MR. BERRY: Your Honor, I'm going to object. He's now harassing her.

MR. BADER: No, I'm having a difficult time with a witness who wants to explain away any inconsistency, Judge, and I ask that she be instructed to just answer my question. Mr. Berry can get back on redirect --

THE COURT: The witness has an absolute right to explain the answer she makes.

MR. BADER: But I ask you to instruct her to first answer my question.

THE COURT: She did. Go ahead.

BY MR. BADER: (continuing)

Q Did Officer Marvin stand there and say, "I'm 5'9", how tall was your assailant compared to me?"

A He said he was 5'9", how did that compare with what I had said.

Q And then what did you say?

A I said he was a little taller.

Q May have been 5'10", is that what you said?

A According to the thing it says that I had said the 5'10" before.

Q But you said 5'10" compared to him?

A I said a little taller than he.

Q That made him 5'10"?

MR. BERRY: Your Honor, I'm going to object at this point. I would like to approach the bench with it.

(Whereupon, the following bench conference was conducted out of the hearing of the jury as follows.)

MR. BERRY: Your Honor, at this point I'm going to object to the line of questioning. Now he's got a right to show her to refresh her memory, but he has a copy in his hand, and she has answered the question. Now he's trying to turn it around on her. She's answered it exactly the way it is in the statement.

THE COURT: (Examining.)

MR. BADER: Do you want her to read the other line? I'm perfectly willing for her to read the other line. If the line above it is what you're concerned with, I'm perfectly willing for her to read that. I'll get to that very quickly.

MR. BERRY: She has. He's asked the question and she's answered it.

THE COURT: Go ahead.

(Whereupon, the bench conference was concluded and the following further proceedings were conducted within the hearing and presence of the jury.)

BY MR. BADEA: (continuing)

Q Mrs. Hollander, in response to my question, you indicated that you had said prior to the time he said he was -- that Officer Marvin was 5'9", that you had told him you thought he was 5'10"; is that correct?

A That's correct.

Q Is that the explanation you want to give, that you had told him you thought he was 5'10"?

A Yes.

Q What else did you tell him in that same sentence, Mrs. Hollander?

A (Examining.) I said it's really hard to say.

Q You said he was 5'10", but I guess it's a little hard to say.

Is that what you said?

A That's what I said.

Q Why was it hard to tell Officer Marvin whether he was 5'10" or not?

A I felt that when I -- that you should be exact, and it's hard to be exact about something like that.

Q Well, when did you think he might have grown two inches from 5'10" to maybe 6 feet?

MR. BERRY: Your Honor, at no time has she ever said that he's grown any.

THE COURT: Sustained.

BY MR. BADER: (continuing)

Q I understand. When did you think that he may have been 5'10" or even up to 6 feet?

A My first impulse in giving a description was to say that he was 6 feet.

Q That is not my question.

A I felt --

MR. BADER: I ask the Court to instruct the witness to answer my question.

THE COURT: The witness can answer to the best of her ability, whether it suits you or not is beside the question.

Answer the question to the best of your ability.

THE WITNESS: Okay. My first impulse was to say that he was 6 feet. I felt that I might be exaggerating, so I knew he was at least 5'10", because I was judging by my husband's height. I felt safe in saying 5'10", that he wasn't shorter.

BY MR. BADER: (continuing)

Q Mrs. Hollander, what makes you afraid of exaggerating?

You said that several times in your testimony. What is that you don't want to exaggerate, why is it that you don't want to exaggerate?

A I guess it's just my nature. I don't like to

exaggerate. I want to tell you the truth to the best of my ability. I feel to add to it wouldn't be right.

Q So that when you told Officer Marvin that you never saw him face to face, were you telling the truth then?

A I was speaking during the attack.

Q Did you tell Mr. Marvin that, "I never saw him face to face during the attack"?

A Well, I'm sure earlier in the deposition or in the statement that I told him I raised up on my elbow and turned towards him and I looked expecting to see my daughter. I certainly saw him then, because I thought I was going to be looking at my daughter.

Q You are sure?

A So at that moment I had to be looking at somebody. And it was him.

Q If I told you you didn't say that to Mr. Marvin, you say you think --

MR. BERRY: Your Honor, now he's trying to testify again.

MR. BADER: Judge --

MR. BERRY: He can't --

MR. BADER: I have a right to unlimited cross examination. If I'm going to be interrupted every time the question -- question pierces the witness's credibility, I'll never get through with cross examination.

THE COURT: If I told you that so-and-so, facts not in evidence, that's a hypothetical. Sustained.

BY MR. BADER: (continuing)

Q Mrs. Hollander, read your statement and find for me where you told the officer that you saw him face to face.

A (Examining.) Well, I said I was awakened by something touching me, and I turned, there was a person crouched beside the bed. I thought it was my daughter.

Q Mrs. Hollander, I didn't ask you to read it. If you're going to read it, we're going to get into a problem. Just find where you said, "I looked and saw him face-to-face."

A Well, that's the time I'm talking about.

Q Did you tell Officer Marvin that, "Yes, I looked and I saw his face"?

Did you?

A No, I didn't say that to him.

Q You never did. But you did say at the bottom, "I never saw his face," didn't you?

A (Examining.) Well --

Q Yes, ma'am?

A That's what it says.

Q That's what it says, and that's what you said, isn't it?

I ask you to look at that line even more carefully, Mrs. Hollander, was there a typographical error on that line?

A (Examining.)
Q (Indicating.)
A (Examining.)
Q Was there, ma'am?
A No.
Q Are your initials there in the middle of that sentence?
A (Examining.) Yes.
Q Do you know why your initials appear right in the middle of that sentence?
A The initials are there to show that's the bottom of the page.
Q In the middle of that sentence?
A It's right at the end of the sentence. The initials are at the beginning and the end.
Q That's what the initial is there for?
A Yes.
Q Do you remember putting your initials there, ma'am?
A Yes.
Q You told the jury earlier that you had gone to bed at 11:30; is that correct?
A Yes.
Q That you thought one of your children might have gone to bed at the same time with you?
A Yes.

Q Do you remember which child that was?
A Gail.
Q She was younger or older?
A Older.
Q And the younger one was still out?
A She was out.
Q She's the seventeen year old?
A She was eighteen at that time.
Q She was eighteen at that time.

Then you said that the front door was an old front door, because it was an old house, with a big window in the door; correct?

A That's right.
Q But the door was unlocked?
A The door was standing open.
Q The door was not only unlocked, but it was standing open?
A That's right.
Q And that the screen door was the only door that was closed?
A That's right.
Q Was the screen door latched or locked?
A No. We didn't have a hook on it then.
Q Was there a light left on?
A Yes.

Q Where was the light, Mrs. Hollander?
A The light was on the table just inside the door.
Q Inside the front door?
A Yes.
Q And that was the living room, wasn't it?
A Yes.
Q And your bedroom is through where; how do you get to your bedroom?
A There's a doorway between the hall and the living room, and my bedroom door is right inside that door.
Q All right. And as you -- was the door between the living room and the hallway open or closed?
A It was closed.
Q Why was it closed, Mrs. Hollander?
A I closed it because I left the light on in the living room and it disturbs my sleep. So I closed the door so the light wouldn't keep me awake.
Q You said something about being negligent in leaving the door and the house unlocked?
A We weren't in the habit of locking the door. We left the door open for ventilation.
Q And the light on?
A The light was on for my daughter to come home.
Q Where was your other daughter?
A Upstairs.

Q Mr. Hollander wasn't living at home anymore, was he?

A No.

Q You were separated at that time?

A Yes.

Q Was there a divorce pending?

MR. BERRY: Your Honor, that's irrelevant.

THE COURT: Totally immaterial, Mr. Bader. Sustained.

MR. BADER: If I only be allowed to pursue the matter, I might be able to show some relevance.

THE COURT: No relevance as to whether or not they were separated.

BY MR. BADER: (continuing)

Q Did you know whether or not your daughter had returned home, the younger daughter; what's her name?

A Laura.

Q Do you know whether or not she had returned home at the time that you were awakened by your assailant?

A No.

Q Where did she sleep?

A In the other bedroom downstairs.

Q And where was Gail sleeping?

A Upstairs.

Q This downstairs bedroom where your younger

daughter would have been if she had been at home, how far removed from your bedroom is that bedroom?

A It's in the opposite corner of the house.

Q Well, are we talking about several rooms away or just on the other side of the living room?

A Well, it's off of the kitchen across the living room, which is a large room. The house is about forty feet square, and we were in direct diagonal, you know, opposite.

Q Have you ever had occasion to scream or try to arouse the attention of your daughter on the first floor?

A Not by screaming, but she's not easy to wake up.

Q You didn't know whether or not she was even home, did you?

A I knew she was home by then because the light was off in the living room.

Q The light was off in the living room?

A Um-hmm (affirmative).

Q You knew that before the assailant came in?

A No, but when -- the doors were open and there was no light coming in from the living room.

Q You were able to determine that when the assailant awakened you?

A Yes. I could tell if the light was on in the living room.

Q The light was off?

A Yes. When my daughter came in, she turned the light off.

Q How do you know the assailant di .'t turn the light off?

A Well, I guess I don't know that the -- the light was off.

Q But you determined from that until just now that your daughter had come home, that's why the light was off; is that correct?

A Yes.

Q That was an assumption on your part?

A I assumed she was home, yes.

Q All right. You didn't scream because you didn't want them to come into the room?

A Well, I really didn't have an opportunity to scream before he made his threat anyhow, and afterwards I wouldn't have screamed. I only wanted him to leave.

Q You went from your bedroom to what room when you -- after the assailant left?

A To my daughter's bedroom, my younger daughter's bedroom.

Q Which was where?

A Downstairs.

Q Was she there?

A Yes.

Q You went immediately to her room?
A Yes.
Q You didn't stop in the bathroom?
A I don't believe so, no, no.
Q Where is the telephone?
A One beside my bed, and there's one right outside of her bedroom.
Q Did you make any attempt to call the police?
A Not at that time.
Q You went to your younger daughter's bedroom, and what did you do?
A Well, I should go back. I did forget to mention the first thing I did was go and close the front door. Late. Afterwards. Then I went to my daughter's bedroom.
Q When you say you went to close --
A The front door was still standing open. My first impulse was to close the front door. So I pushed it shut.
Q Then what?
A Then I went to my daughter's bedroom.
Q Awakened your daughter?
A Yes.
Q What did you do then?
A Went upstairs to my older daughter's room.
Q You just awakened your younger daughter and left her s -hen went upstairs?

A No, I asked Laura to come with me upstairs to her sister.

Q And then what?

A We went upstairs and then I told them what had happened. I knew we had never been in the habit of locking our doors. My husband never permitted us to lock doors. We didn't even have locks on them. There was no lock on the front screen door, we had been trying since he left our home to break our habit, to lock the doors, and I knew that I -- I wanted to use this as a means of shocking us, I guess, to break a long-standing habit. Never in their entire lives have they been in the habit of locking doors. It was impossible to retrain ourselves.

Q That was your purpose in going upstairs to your daughter's room?

A That was my number one purpose. I imagine my second purpose was that I wanted some comforting.

Q Did you get it?

A Of course.

Q Did you describe to them what had happened to you?

A I didn't describe it in detail, I just simply told them what had happened, that I had been raped.

Q How long was it before you called the police?

A I would say probably fifteen minutes.

Q And how long after that before the police came?

A The first squad car arrived immediately with, you know, the dispatcher kept me on the telephone until the first police officer was at the door. I know it was less than five minutes.

Q And from that point where did you go when the police car arrived?

A That was the road patrol that came, and they came and stayed with us until the detectives came, and when the detectives came, shortly after they arrived and asked a few questions, one of them took me to the hospital.

Q How long after you called the police was it before you went to the hospital? Elapsed time?

A I would guess half an hour or something like that.

Q Did you give a statement to any of the officers?

A No, not -- no, not a detailed statement. I just told them that a man had entered and I told them that he had stumbled on the stairway, and you know, he had fallen against the door and slammed it shut. They were going to be looking for fingerprints. So that's why I told them about the door slamming shut, that he had to open the door to get out of the bedroom. And I also told them about the door between the bedroom and the -- I mean between the living and the hallway was closed. And I didn't describe in detail the actual attack, that statement was given at the police station.

Q When you went to the hospital, who carried you there?

A Terry Marvin took me to the hospital.

Q Do you know the names of the detectives who came to the house?

A Umm -- I do now, I didn't know Detective Gandy before. That was one of them. And Detective Shoup. I knew his name.

Q Did you recognize any of those officers when they came?

A I recognized Shoup.

Q Was he with Gandy at the time?

A I'm not sure if they arrived together, I'm not -- I'm not even certain if he was there before I went to the hospital. I know he was there when I came home, but I -- the two officers that arrived to begin with, the road patrol, and then Terry Marvin came for a little while, there seemed to be a lot of people around. I'm not exactly certain, I know that Shoup was there when I came home because I recognized him as somebody that I knew. And whether he -- I feel that he wasn't there before I went to the hospital, but I could be wrong about that.

Q Yes, ma'am. Who took you to the hospital?

A Terry Marvin.

Q And what happened at the hospital?

A The nurse took me into the examining room, and she had me remove my clothing and put on a hospital gown. The doctor came in and they have a kit that is supplied by the government, I guess, with instructions on what to do, how to examine you. The nurse read the instructions as the doctor proceeded with the examination.

Q Between the time you closed the front door and the time you went to the hospital, how much time elapsed?

A Probably forty-five minutes to an hour.

Q Okay. How long were you at the hospital?

A Not very long, fifteen, twenty minutes. Something like that.

Q Who made the examination of you?

A The doctor that was on the duty. I don't know his name.

Q Did you give him a history of what occurred?

A He didn't ask me anything.

Q Can you tell the jury what part of your body he was examining?

A He examined the vagina and the rectal area, routine exam.

Q Did he make any statement to you at that time?

A No.

Q Did you make any statement to him?

A Yes.

Q What did you tell him?

A I said to him that I didn't think he would find much evidence, he didn't comment.

Q From the hospital, where did you go?

A To the police station.

Q With Officer Marvin?

A Yes.

Q Did he offer to take you home first?

A He asked me if I wanted to make a statement then or if I wanted to wait until the next day, and I said I would just as soon do it now.

Q So you went from the hospital down to the police station?

A Um-hmm (affirmative).

Q And that statement was transcribed on a recording machine?

A Um-hmm (affirmative), yes.

Q And it is from that interview on the recording machine that the documents you have previously identified was typed that you signed?

A Yes.

Q And that's the only statement you have ever given that you have signed and written, recorded, anywhere except your deposition?

A Yes. About that, yes.

Q Then from the police station where did you go?
A I went home.
Q From the time you left the hospital until you returned home, what period of time elapsed?
A I don't know.
Q Approximately, if you know?
A I suppose an hour or something, I don't know, however long -- however long it took for the deposition.
Q When you arrived home, did you have any idea what time it was?
A No.
Q I believe you told the jury earlier that you were working as a teller at the First National Bank in Punta Gorda?
A Yes.
Q Did you go to work that morning?
A I did.
Q Work all day?
A I did.
Q Did you work the following day?
A Yes.
Q The day after that?
A I was a new employee, I had worked there less than two months. I didn't want to take off. When you've had to return to work when you're 50 years old, you want to make a

good record. I thought I was going to go home that day, but I was so keyed up I couldn't relax, I couldn't have gone home and gone to sleep or anything, anyhow.

Q When -- or did you ever consult your own physician regarding the consequences of the assault on you?

A I consulted my own physician about two weeks ago.

Q The first time?

A It was the first time I discussed this with him.

Q Did you consult anybody at all about your condition in the days immediately following the alleged assault?

A I went back to the hospital to find out the results of the tests.

Q And what did you find out?

A That they were negative. That I was all right.

Q Results were negative?

A That's right.

Q Did you see the doctor?

A No.

Q Did you ask to see the doctor?

A No.

Q Do you know the doctor's name?

A I do now because I saw it on the paper, Dr. Stein.

Q What paper did you see?

A On a subpoena for the earlier --

Q Where did you see a subpoena for Dr. Stein?

A It was the one to me that showed his name on it that was -- it was for the trial in May.

Q Paper sent to you had his name on it?

A It had the list of witnesses on the -- on my -- on the subpoena it showed his name. My name and his name.

Q Anybody else's name?

A No.

Q Just yours and his?

A That was all that was on my copy.

Q You described the feelings of your assailant as being nervous and tense; is that true?

A That's how it seemed to me, yes.

Q That his heart was beating rapidly?

A Yes.

Q I asked you earlier while you were laying on your stomach with your hand underneath your body, you said that he felt down underneath your body and reached and touched first your breasts and then your vagina; is that right?

A Yes.

Q You said it was difficult for him to get his fingers inside your vagina pressed against his weight on top of your body down against the bed; is that what you told me?

A That wasn't exactly the way it --

Q Well, tell me the way it was exactly.

A He reached around in front of me to feel the vagina, and then he removed his hand and when he inserted the penis --

Q Mrs. Hollander, are you aware that it is essential in this case that there have been a penetration to make out this crime; do you know that?

MR. BERRY: Your Honor, may I object to that. I'd like to approach the bench.

THE COURT: Very well.

(Whereupon, the following bench conference was conducted out of the hearing of the jury as follows.)

MR. BERRY: I'm going to object to that question on the grounds that it's irrelevant, it's immaterial, it's a matter of law, and he can ask her questions of fact. He's now going into whether or not she knows about the law on that, and that's -- there's a possibility that he's misstating the law. I do not believe penetration is necessary under the definition of sexual battery, it's a union or touching of the sexual organs of another.

MR. BADER: I think it's a simple question, if she knows she can say. If she doesn't know, she can say.

THE COURT: Objection be sustained on the grounds

of total immateriality whether she knows or not.

(Whereupon, the bench conference was concluded and the following further proceedings were conducted within the hearing and presence of the jury.)

BY MR. BADER: (continuing)

Q After he made the effort to touch your vagina with his hand, you say he penetrated your vagina with his penis?

A Yes.

Q In the position you were in, you were flat on your stomach and he was right on top of you; is that correct?

A Yes.

Q Can you tell me where your hands were, where was your right hand?

A My right hand was pinned under my body.

Q Okay. Where was your left hand, ma'am?

A I don't know. I don't remember. He had a hold of it part of the time and part of the time he didn't. It was -- I don't know where it was. I wasn't in a position to, you know, hit him with it or anything.

Q Was your hand loose at all?

A Yes, I'm sure it was.

Q Your left hand was loose?

A Part of the time.

Q And you were laying straight, flat on your stomach?

A Not straight, flat, no, my arm was underneath me, I was a little bit to the side.

Q You mean your body was laying at some sort of an angle?

A I wasn't just flat on my stomach, I was probably just a little to one side.

Q Well, were you laying at a prone position?

A Yes.

Q Feet straight out from the rest of your body?

A Yes.

Q Could you tell what he was doing with his right hand?

A No.

Q It was his left hand that touched your breast and vagina; is that right?

A Yes.

Q What did he do to force his penis into your vagina?

A Well, I could feel his body push against me.

Q And you could feel his body all the time, because I think you said he was on top of you from head to foot?

A All right. I could feel his body in that area, and from --

Q Well, was anything special or unique that you could tell about his body that he could get his penis into your vagina like you have told this jury?

A I could just feel him push with his hips.

Q He pushed with his hips?

A Right.

Q Did he say, "Spread your legs"?

A No.

Q Did he say to put some oil on you or some Vaseline on you or something to assist you?

A He didn't make any statements other than what I have said.

Q Did he use any oil or any Vaseline?

A I don't know. Not that I know of.

Q Mrs. Hollander, were you in the custom of allowing your pubic hairs to grow in their natural state?

A Yes.

Q Did he in any way separate your legs and hold them apart?

A With his legs.

Q You said you felt his legs, his body on top of you, did he ever put your legs apart?

A He didn't actually pull them apart, he just pushed them apart with his leg.

Q Well, now, your legs came apart, did they?

A (No audible response.)

Q Does that make it easier to fit it in, Mrs. Hollander?

A I suppose.

Q Fits the story, too, doesn't it?

MR. BERRY: Your Honor --

THE COURT: Objection be sustained.

I assume you were fixing to make one.

MR. BERRY: Yes, sir.

THE COURT: Objection be sustained.

BY MR. BADER: (continuing)

Q Mrs. Hollander, how long did it take him to enter your vagina?

A I don't know.

Q How long did he remain?

A Not very long.

Q What did he do when he finished and removed himself from your vagina?

A That's when he explored the rectal area with his hand.

Q Now, in order to do that, did he have to change his body in relation to your body?

A He had to withdraw a little bit.

Q Which hand did he use to explore your rectal area?

A The left hand.

Q Again, his left hand?

A Right.

Q What did he do with left hand, ma'am?

A He felt for the rectum and when he found it he inserted his penis there.

Q How did you determine that he found the rectum, ma'am?

MR. BERRY: Your Honor, now this is getting to the point of ridiculousness. He's asked the question and she's answered it. I'm going to object to that point, he's had complete cross examination on this.

MR. BADER: Judge, I'd like to be heard on this. I don't enjoy this one bit, either, if anybody thinks -- I'm a court appointed lawyer, that I could take this job and do this for my fun and my gain, to do --

THE COURT: (Indicating.)

THE BAILIFF: Mr. Bader, just a minute, please. I am taking the jury out.

(Whereupon, the jury retired from the courtroom.)

MR. BADER: I've had a difficult time with this case, and I don't need to be interrupted and have speeches made.

THE COURT: We'll have a fifteen-minute recess. The objection is still before the Court.

(Whereupon, a short recess was taken.)

THE COURT: Where were we?

MR. BERRY: Your Honor, I believe that at the point prior to the recess that I have objected on the grounds

that he's continuously going over and over and over the same thing, and she's answered these questions to the best of her ability. He's been given complete freedom of cross examination. I think now it's getting to the point of ridiculousness in that regard, and I just --

THE COURT: State specifically the ground that you're objecting to.

MR. BERRY: Yes, Your Honor, more specifically, he asks her a question and she answers him, and then he tries to put words in her mouth. To that aspect, she's doing the best she can.

THE COURT: The Defendant is entitled to a thorough and complete cross examination of any witness against him. When it gets to the point of being repetitive -- at this point I will overrule the objection.

(Whereupon, the jury returned to the courtroom and the following further proceedings were conducted within the hearing and presence of the jury.)

BY MR. BADER: (continuing)

Q Mrs. Hollander, you previously told the jury that you had met me on more than one occasion in my duty as court appointed lawyer for Mr. Hayes.

I believe you said you met me first when I came to your home with my wife; is that correct?

A That's right.

Q Do you recall meeting me in the courthouse in Port Charlotte on September 23rd, 1980?

A In Punta Gorda?

Q Yes.

A Yes.

Q And do yourecall the purpose of that meeting?

A For a deposition.

Q Yes. And the deposition, there was a court reporter present?

A Yes.

Q Just like the young lady here today?

A Yes.

Q Do you remember that you were given an oath and we asked certain questions?

A Yes.

Q Earlier in this trial you testified that from your knowledge gained on the night in question, in the moments, seconds, that you saw the assailant stumble out of your room and again in the seconds as he ran down the street past your window, you saw a sufficient silhouette that you could identify him.

When I asked you, you told the jury today, yes, that's him; is that correct?

A Yes.

Q I ask you now, did you say to Detective Shoup --

MR. BERRY: Line and page, please.

MR. BADER: Sixteen, bottom of the page.

BY MR. BADER: (continuing)

Q Did you say to Detective Shoup, (reading)

"This is the man, I would know him anywhere, I'll never forget his face"?

I'm sorry, that's not what you said, that's my question.

Do you remember the answer to that question?

A (No audible response.)

Q Do you remember your answer?

MR. BERRY: Excuse me, Mr. Bader, what page are you on?

MR. BADER: Well, I went from sixteen to seventeen.

MR. BERRY: Thank you.

MR. BADER: It's the last line on sixteen and the answer is on seventeen.

THE WITNESS: Did I say that to Detective Shoup, is that what you--

BY MR. BADER: (continuing)

Q No, ma'am, I asked you -- I asked you a question, the bottom of page sixteen, (reading)

"Did you say to Detective Shoup, this is the man, I would know him anywhere, I'll never forget his

face?"

That was the question I asked you; do you recall your answer to that question?

MR. BERRY: Your Honor, I'm afraid I don't understand what is going on here. If he's attempting to impeach her, she's got a right to review it, her deposition.

THE COURT: Sustained.

MR. BADER: May I be heard?

THE COURT: Sustained as to the form of the question.

BY MR. BADER: (continuing)

Q Do you have a recollection of your answer to that question?

A When did Detective Shoup ask me that question?

Q I really don't know.

Do you not remember when these questions were asked of you, do you not remember this event?

MR. BERRY: Your Honor, again I'm going to object to the form of the question.

THE COURT: Mr. Bailiff -- (indicating).

(Whereupon, the jury retired from the courtroom.)

THE COURT: The Court will sustain the objection as to the form of the question. You can use a deposition by reminding the witness where it was taken, when

it was taken, who was present, reading the question, reading the answer, and asking if you recall the answer. You cannot ask that question now and say, "What answer did you give then?"

The objection is sustained. If you want to do it right, otherwise -- bring in the jury.

(Whereupon, the jury returned to the courtroom and the following further proceedings were conducted within the presence and hearing of the jury.)

BY MR. BADER: (continuing)

Q Mrs. Hollander, you told this jury that you identified the Defendant from the photograph that you saw, the assailant, when he was in -- as he left your room and again as he ran past the window.

You also told the jury, I believe, that the detective brought you some photographs after the Defendant was arrested; is that correct?

A That's correct.

Q You saw pictures which you said, "That is him," and he said, "Yes, that's the man we arrested"?

A Yes.

Q You said that you can independent of all this other information, you could make an identification based on just what happened on the night in question, not from photographs and pictures; is that correct?

A Yes.

MR. BADER: I direct your attention, Counselor, to page sixteen.

BY MR. BADER: (continuing)

Q I'll read the following question from your deposition --

MR. BERRY: Line?

MR. BADER: Line seventeen.

BY MR. BADER: (continuing)

Q "Question: Okay. Now, ma'am, were you able, when Officer Shoup came back a day or two after the arrest of the suspect, to identify him from the photograph?

Answer: I looked at the photographs and selected one of them, and he said that was the man they had arrested.

Question: When you selected one of them, what did you tell the officer?

Answer: I don't remember what I told the officer.

Question: Well, did you say to Detective Shoup, this is the man, I would know him anywhere, I'll never forget his face?".

And you answered: "No, I didn't say that.

Question: What did you say?

Answer: I really don't remember what I said.

Question: Well, did you say this could be him or this might be him or out of these pictures this is the one?

Answer: Something like that.

Question: Were you able to say--are you able to say now that the photograph that you saw a day or two after the arrest of the suspect is the person that was in your room on May 13th?"

And your answer was: "I could not walk up to a man and say this is for certain the man, just on seeing him, because I did not see him that clearly as I'm seeing you."

Did you make those statements?

A Yes.

Q Mrs. Hollander, what have you done, what has happened that makes you now see him so clearly that you can say that is the man that you saw in your room on May 13th?

A This is the first time that I'm seeing him in person. Where from a photograph, a photograph that Detective Shoup brought, all you're seeing is the head. The total person, the build, the way they stand, the silhouette, the shape of their head is more evident in person than it is from a photograph.

Q In other words, you're telling this jury that you didn't know and the State of Florida didn't know until this

trial began whether or not you were capable of identifying this defendant in Court?

Is that what you're saying, it's only now today that you're here in Court and you can look at him for the first time in the light of this courtroom that you are able to say, "Oh, yes, he looks like the person way back a year ago, fourteen months ago, that was in my room in the dark?"

Is that what you want us to believe?

A The photograph looked like the person as nearly as I could tell. Seeing somebody in person is different than seeing a photograph.

Q Is your answer to my question that it is now and today that you see Mr. Hayes sitting in that seat that you are for the first time able to say that in your own mind, yes, that's the person you saw on May 14th; is that what you're telling this jury?

A (No audible response.)

Q Are you shaking your head "yes", ma'am?

A Yes.

(Whereupon, Defendant's Exhibit 5 was marked for identification.)

BY MR. BADER: (continuing)

Q Mrs. Hollander, I'll show you Exhibit 5 for identification and ask you if you've ever seen it before, and I ask you to hold it down so that the jury may not see it.

A (Examining.)

Q Do you recognize Exhibit 5 for identification?

A Well, yes. Yes.

MR. BERRY: Excuse me, I can't hear.

THE WITNESS: Yes.

BY MR. BADER: (continuing)

Q Okay. Can you tell me whether or not that is the photograph or the composite that was made based on your description of Mr. Hayes?

A I don't believe that I had a moustache in it.

Q I don't know if anybody could hear you, I did, but can you answer that?

A I don't believe that there was a moustache showing on the composite that I originally put together.

Q You don't believe the composite you had, had a moustache showing on it; do you know whether ot not the assailant had a moustache?

A I didn't know.

Q You didn't know?

A That's why I don't think -- that's why -- the one I put together did not have a moustache.

Q In other words, you did not know whether the assailant had a moustache.

Can I put it another way, Mrs. Lollander, did you know that he didn't have a moustache?

A Did I know that he didn't?

Q Well, when you described--

A No, I--

Q When you described him to the officer, didn't he ask you?

A I didn't describe him as having a moustache.

Q So to your knowledge, he didn't have a moustache?

A That's right.

Q All right, thank you.

I'll show you Composite Exhibit Number 6 for identification and ask you if you recognize that.

A (Examining.) Well, this would be more like the one I put together.

Q Well, can you --

A Without the moustache.

Q Can you tell us, the jury, if that is the one that you did put together?

A (Examining.) I thought that the hair was maybe a little shorter on the one that I put together. But other than that, that would be--

Q Well, now, you saw those at your deposition, didn't you?

A Yes, I did.

Q I showed them to you?

A I don't know if they were the same pictures.

Q Do you remember identifying the wrong pictures as being your composite?

A I remember that I wasn't sure about it.

Q Do you remember that you made a mistake and identified the wrong one?

A Um-hmm (affirmative).

Q You do? You have to speak up or the jury won't know.

A Yes.

Q Mrs. Hollander, I ask you to look at the person you identified as your assailant.

Is he in the courtroom now?

A Yes.

Q Can you tell me whether or not he has a moustache?

A Yes, he does. He does now have one. I don't know whether he had one then or not.

Q When you told the officers that he didn't have a moustache, did you also tell them that he didn't have a beard?

A I said that he did not have a beard. I did not specifically state that he did or didn't have a moustache. I knew he didn't have a beard because he brushed his cheek against me and I would have felt a beard.

Q You think you would have felt a beard?

A I think I would have felt a beard, or if he needed to shave.

Q But you have no way of knowing whether you would have felt a beard or not; do you?

A I think I would have felt a beard against my face.

Q When did he touch your face, Mrs. Hollander, I understood he touched the rest of your body with his hands, but you have not told us before that he touched your face.

A He did touch it.

Q With his beard?

A He touched my face with his cheek, and he touched my ear. He kissed my ear or put his tongue in it, or something. I'm not sure.

Q Well, have you ever told that story to anybody before?

A No.

Q If these things happened, you say that's how you would know that he had a beard?

A Yes. I think I would know if he had a beard.

Q Because he --

A Because I felt his face against my face.

Q But wouldn't you feel his moustache against your face?

A Not really. If he put his cheek against my cheek here I wouldn't feel his moustache if he had one.

Q Mrs. Hollander, is everybody's moustache or beard the same?

A No.

Q How do you know that the person that assailed (sic) you that night didn't have a beard and moustache?

A He may have had a moustache, he did not have a beard.

Q Because he kissed your ear, and --

A I could feel his face was clean shaven. That his cheek was clean shaven.

Q Can you have a beard without having -- and have your cheek clear at the same time, in your opinion?

A No.

Q You can't.

Have you ever seen pictures of oldtimers who grew beards only from under their chin and their neck and didn't have any hair on their chin or cheeks?

A Well, that wasn't the type of beard I was describing.

Q But you weren't looking at the beard, were you, Mrs. Hollander?

A Besides, I saw his face. I saw there was no beard hanging around his face.

Q You mean it was light enough in there that you could see that he didn't have any beard?

A I think I would have seen some -- I could see that his face was slim, if their had been a beard I would have

seen.

Q We don't know what you would have seen or might have seen, we want to go by what you did see, what you did experience. What might be or what's exaggerated, we can't go by.

Do you recall telling me about his kissing your ear on your deposition that day?

A I don't -- I don't believe I did.

Q Do you remember my asking you, (reading) "Do you recall what the picture of him -- "

MR. BADER: I'm sorry, Gene, page 19, line 12.

BY MR. BADER: (continuing)

Q The question that I asked you was, (reading) "Do you recall what the picture of him looked like in the newspaper story when he was arrested?"

MR. BERRY: Excuse me, what line was that, Mr. Bader?

MR. BADER: Twelve.

MR. BERRY: Page 19?

MR. BADER: I'm sorry, page 18.

MR. BERRY: Thank you.

BY MR. BADER: (continuing)

Q Your answer was (reading)

"Answer: One picture that I have seen showed a back view, like, you know, just a little bit of

the side of his face, that's the only picture I remember seeing.

Question: Can you remember now what it was about the picture that you looked at that made you pick the suspect?

Answer: The shape of his face, the length of his hair--mostly just the shape, you know, the shape of his face.

Question: The outline of his face?

Answer: That I would have seen the silhouette.

Question: And that was the silhouette that you saw when he got up to leave, the left side of his face?

Answer: No, the picture was a straight-on view."

Now, let me ask, the picture you're referring to was the one the police brought to you; isn't it?

A Um-hmm (affirmative).

Q But your recollection was based on his silhouette; wasn't it?

A The silhouette, both facing him as I'm facing Mr. Berry--

Q But you never faced him, did you, Mrs. Hollander?

A When I turned--when I first turned when he was crouched beside the bed.

Q Okay. I believe I left off at the bottom of page

18 where you answered, (reading) "No, the picture was a straight-on view."

That's the picture the police department brought you, right?

A Yes. I believe so.

Q Then I asked you the following question (reading)

"Question: Yes, but the silhouette that you saw--

Answer: But I saw the silhouette of a straight-on view also, when I was awakened and turned and looked It was not a side view."

Are you saying that you recognized the pictures of the police department as being the face of the person that you saw when you leaned over your shoulder?

A It came -- it came as close to fitting the description of the out--the shape of his head, the way his ears were placed.

MR. BADER: I have no other questions of this witness.

MR. BERRY: I have maybe just one or two.

I'd ask this be marked State's Exhibit Number 2 for identification purposes only.

(Whereupon, State's Exhibit Number 2 was marked for identification purposes only.)

MR. BADER: What is that, the same statement?

MR. BERRY: Yes.

MR. BADER: You want yours marked?

REDIRECT EXAMINATION

BY MR. BERRY:

Q Mrs. Hollander, I ask you to look at this and see if you can recognize this as an exact duplicate of the statement that Mr. Bader asked you questions about that you gave to the police department the day following the assault on you.

A (Examining.) Yes.

Q Does it accurately reflect your entire statement that you gave to them by tape?

A Yes.

Q Is that your signature on each of the three pages and your initials after each of them?

A Yes.

MR. BERRY: Your Honor, at this time the State would ask that State's Exhibit Number 2 be introduced into evidence.

MR. BADER: Your Honor, I would object and not because I think that statement is incorrect, but I would object because there's no foundation. That witness has said that she has not seen or looked at that document since the day she signed it or witnessed it, and has not reviewed it or rehearsed it. That's what she said, and Mr. Berry just asked her is that your

statement, does it accurately and completely reflect everything on the three pages. She didn't even look at them.

MR. BERRY: Mr. Bader, the Judge is up here, you're making the objection to the Judge.

MR. BADER: Well, I find there's no foundation, Your Honor, for the accuracy by this witness. I agree when we get the reporter in here, we might be able to do it, but I find it appalling that this witness could testify at this point that it accurately reflects everything she said and did on that day when she couldn't do so for me.

MR. BERRY: Your Honor --

MR. BADER: I say there's no foundation.

THE COURT: The rule is when you use part of it, only part of it, he can introduce the whole thing into evidence.

Let it come in.

MR. BERRY: Thank you, Your Honor.

(Whereupon, State's Exhibit Number 2 was admitted into evidence and marked as such.)

MR. BADER: What are we calling that now?

THE CLERK: State's Exhibit Number 2.

MR. BERRY: No further questions, Your Honor.

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RECROSS EXAMINATION

BY MR. BADER:

Q Mrs. Hollander, having testified that this is accurate and complete and it's your statement, can you tell me whether you ever described Mr. Hayes or your assailant as being big or muscular?

MR. BERRY: Your Honor, I'm going to object at this time. It's outside the scope of direct. There's physical evidence been introduced, physical evidence speaks for itself. I have no objection if Mr. Bader wants to publish it to the jury, but the statement in its entirety, but I would object to any direct questioning of her as to the contents of it. It's introduced into evidence at this time.

THE COURT: You want to be heard, Mr. Bader?

MR. BADER: I'm sorry?

THE COURT: You want to be heard?

MR. BADER: If I get the chance, I always want to.

THE COURT: Get it on. Let's go.

MR. BADER: Yes, I wish to examine her as to --

THE COURT: No, let's hear you on this objection. That's what we're hear on.

MR. BADER: I'm not sure, I've lost track of the objection.

THE COURT: Do you have anything to say on the